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# THE FEDERAL REPORTER.

VOL. 9.

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CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

NOVEMBER, 1881—FEBRUARY, 1882.

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JAMES W. GOODWIN, EDITOR.

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# CASES

## ARGUED AND DETERMINED

IN THE

## United States Circuit and District Courts.

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### TAYLOR v. THE PHILADELPHIA & READING R. Co.\*

(Circuit Court, E. D. Pennsylvania. October 14, 1881.)

#### 1. RAILROAD—RECEIVERS—AUTHORITY TO CREATE CAR TRUST—WHEN REFUSED.

Where the net earnings of a road, which is in the hands of receivers, are amply sufficient to pay for a necessary purchase of additional rolling stock, the court will not authorize the receivers to raise money for the same by the creation of a car trust, in order to allow of the application of the income to the bondholders.

#### 2. SAME—POWER OF THE COURT.

Whether the granting of authority to create such a trust falls within the proper scope of the court's authority, *quære*.

#### 3. SAME—OBJECT OF RECEIVERSHIP.

The court's custody of railroad property, which has been placed in the hands of receivers, is only for the temporary preservation of the property during foreclosure proceedings, and the road should pass with as little delay as is reasonably practicable into the possession of owners who will best be able to determine how it should be managed.

Petition by the receivers of the Philadelphia & Reading Railroad Company, setting forth that the rolling stock which passed into their possession at the time of their appointment was not sufficient to transact the increased business of the road, and that they had caused to be constructed, in the shops of the company and at the shops of other parties, a number of cars and locomo-

\*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

tives, and had given orders for the construction of an additional number, and that they would probably find it necessary to order the construction of a still further number; that, in their judgment, it was not fair or advantageous to the creditors of the company to pay so large an amount as would be required for this increased equipment from the current earnings, thereby depriving bondholders and other creditors "of that income which is the natural source for the payment of interest on their debt;" that petitioners believed it to be for the best interests of the trusts committed to them that funds to pay for said equipment already constructed and ordered should be provided by a car trust of at least \$1,000,000, according to the plan set forth in a certain agreement and lease annexed to the petition. Petitioners prayed for leave to execute said agreement and lease, and carry into effect said plan. The agreement annexed to the petition provided for a conveyance to a trustee of the rolling stock constructed or ordered, in trust, to issue 1,000 car-trust certificates, secured thereon, and redeemable at periods of from one to ten years, and to apply the money received therefrom to the payment of the cost of said equipment. By the lease annexed to the petition the trustee was to lease this rolling stock to the receivers at a rental therein provided for. The petition was referred to one of the special masters in the cause, (George M. Dallas, Esq.,) who, after hearing evidence, reported that he believed the agreement and lease to be a proper and wise means for procuring the needed rolling stock, and recommended that the prayer of the petition be granted.

*Samuel Dickson and Richard L. Ashhurst*, for petitioners.

*John C. Bullitt* appeared for the railroad company and for certain stock and bondholders, but did not oppose the petition.

BUTLER, D. J., (*orally*.) This is in effect an application on the part of the receivers to borrow money upon rolling stock (cars and engines) manufactured at the company's shops and elsewhere, and in process of manufacture, for the receivers. In terms, it is for the creation of a car trust, but in effect, it is for authority to make a loan, as stated.

Two questions arise in considering the application: *First*, is the matter contemplated within the scope of the court's duty and authority, as custodian of the road and other property of the company? *Second*, if it is, would it be wise to grant the application? As respects the first question, it must be borne in mind that the custody of the court is temporary, to preserve the property so long only as may afford reasonable time to the plaintiffs to prosecute their proceeding to a close, in case the company shall fail to make satisfactory arrangements to relieve itself. Whether the order asked for by the receivers or the allowance of it, falls within the proper scope of the court's authority, under the circumstance, is certainly open to doubt. I will not, however, enlarge upon this subject, for if it was not so open to doubt, I am satisfied it would not be wise to make the order.

The petitioners admit, and the testimony proves, that the net earn-



ings of the road are amply sufficient to make the purchase required; and, if necessary, these earnings should be so applied. The ground upon which the petitioners desire to borrow, instead of using such moneys, is that these moneys may be applied to payment of the bonded creditors of the company, in discharge of interest. The court esteems it wiser to allow such interest to go unpaid rather than discharge it by means of borrowing money, which may tend to mislead creditors and others, respecting the actual condition of the road and its earnings. It must be borne in mind that the court's custody of this property is not likely to continue very much longer. The foreclosure proceeding has been running for eighteen months, and should reach its termination without unnecessary delay. The court expects it to do so. The interests of all parties involved require that the road and other property shall pass into the custody and management of owners without prolonged delay.

The modern practice, prevailing to some extent, of transferring corporate property to the custody of the courts, to be thus held and managed for an indefinite period of years, to suit the convenience of parties, (whereby general creditors are kept at bay,) I regard as a mischievous innovation. I have no doubt the petitioners are fully satisfied of the wisdom of the proceeding which they suggest, and that they are actuated by a sincere desire to promote the best interests of the road; and they have in this the approval of the present board of managers. We do not, however, agree with them, and must be governed respecting it by our own judgment. The petition is therefore disallowed.

McKENNAN, C. J., (*orally*.) I concur in what Judge Butler has said. The object of the proceeding whereby the property of the company was placed in charge of the court, and the character of the court's authority respecting it, we have heretofore had occasion to explain very fully. We hold the property of the railroad company to preserve it,—to keep it in its present condition while the proceedings under the bill of foreclosure are being prosecuted to their termination. I entertain considerable doubt of the authority of the court to make the order asked for, and this of itself is sufficient for me; but I agree with Judge Butler in all he has said respecting the inexpediency of making the order, even if we had authority so to do. The property should pass, with as little delay as is reasonably practicable, into the possession and control of owners who will best be able to determine how it should be managed, and what measures relating to it are most

likely to promote their interests. To the extent that the earnings of the road are required to keep it up, in stock and equipments, and to preserve the property, the receivers have authority so to apply such earnings; but to borrow money to enable them to continue to pay interest to bondholders I consider unwise.

Petition disallowed.

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**COOK, Assignee, v. HILLIARD and others.**

*(Circuit Court, N. D. Illinois. October 17, 1881.)*

**1. MORTGAGES—FORECLOSURE.**

Where the single defence to a bill, brought to foreclose a trust deed with condition broken, is an alleged sale by the trustee of a portion of the mortgaged property at public auction, a decree of foreclosure will be allowed, in the absence of any memorandum in writing of the sale, and where the testimony on the point of the acceptance of the bid by the auctioneer is conflicting.

**SAME—SAME—PARTIES.**

The alleged purchaser is not a necessary party to the foreclosure proceedings.

*H. D. Beam and John Gibbons, for complainant.*

*Goudy, Chandler & Skinner, for defendants.*

**BLODGETT, D. J., (orally.)** This is a bill for foreclosing a trust deed given by Mr. and Mrs. Hilliard, on the nineteenth day of November, 1873, to H. F. Vallette, trustee, on lots 48, 49, 50, 51, 52, 53, 54, and 55, Hilliard and Dobbins' Addition to Washington Heights, in this county, to secure the payment of \$10,000, payable to the Protection Life Insurance Company in five years from date, with 7 per cent. interest. It is admitted that the insurance company has been adjudicated bankrupt, and that the note has come into the hands of complainant as assignee of the insurance company.

The only point made by the defendant is disclosed in the answer of Mrs. Hilliard, who avers that Mr. Vallette, the trustee, advertised the property in question to be sold at public auction by him, under the powers of sale contained in the trust deed, on the twenty-sixth of March, 1879, and that in pursuance of such advertisement he proceeded to make such sale by offering lot 48, and that the sum of \$650 was thereupon bid for said lot by and in behalf of Charles B. Wright, and the same was struck off and sold to him, and that after this lot was so struck off to Wright the amount of his bid was duly tendered to the trustee, and a deed demanded, but that the trustee declined to receive the money and to make the deed.

Defendants concede that the complainant has the right to a decree for the amount due on the note after deducting the \$650 bid for lot 48, and is entitled to a foreclosure on all the lots except lot 48. There is a conflict of evidence as to whether this lot 48 was struck off to Wright on his bid. The proof shows that the property was offered by Vallette under the powers contained in the trust deed.

It is admitted that the eight lots in question together made up the tract of land on which was situated the dwelling-house, out-houses, garden, etc., occupied by Mr. and Mrs. Hilliard as their home. And it appears that about the time for opening the sale the question was raised between the trustee and assignee as to whether the property should be sold in separate lots according to the subdivision description, or whether they should be sold together as a whole or one single tract.

It is conceded, however, that the trustee proceeded to offer lot 48, and that several bids were made upon it, and that the last bid made was this bid of \$650 by Mrs. Hilliard for Wright, and the complainant insists that while the trustee was still crying the lot he directed the assignee to stop, declare the sale off, or stop the sale, and the trustee thereupon stopped the sale without striking off the lot or accepting the bid, or in any way declaring the lot sold; while the defendants insist that just at the juncture when the trustee was directed to suspend the sale he said, "sold," or "gone," or used some term indicating that the lot was struck off on the bid by Mrs. Hilliard.

I do not think this testimony on the part of defendant, even if it was not contradicted, shows a valid sale. It is not such a selling as could be enforced by a bill for specific performance. It is evident from the defendants' testimony that the trustee did not consider that he had accepted the bid. He took no steps to consummate the sale, and he did not recognize the bid as a sale. The minds of the parties had not met. The transaction was not sufficiently complete to take it out of the statute of frauds. In *Burke v. Haley*, 2 Gil. 614, the court says:

"All the recent decisions seem to admit the principle, and we think with sufficient reason in their favor, that sales made by auctioneers stand upon the same footing as those made by private individuals, and require that some note or memorandum should be made and signed by the party to be charged, to render them valid and obligatory upon the purchaser. \* \* \* The auctioneer, it is true, is by law the agent of both vendor and purchaser, and a memorandum signed by him would be binding on the latter, provided it was sufficient either in itself, or when connected with other written or printed evidence, to show what was the contract of the parties."

Here there is an entire absence of any such memorandum, and the affirmative proof shows that the trustee who acted as auctioneer did not understand that a sale was made or the lot struck off on Mrs. Hilliard's bid. The rule above quoted is affirmed in *Doty v. Wilder*, 15 Ill. 407, and has ever since been followed by the courts of this state.

It is urged upon the part of the defendant that Wright was a necessary party to this suit. I cannot see how that can be under the facts in the case, because there was nothing of record showing Wright's interest, and no binding contract extant showing any interest in him.

The only rule that I know of is that the complainant must make those parties who are known to him to have a legal or equitable interest in the property, or whom the pleadings or proof discloses have such an interest as that the court cannot proceed to a decree without bringing them into the case.

The complainant in this case is not obliged now, on this alleged sale, to amend his bill and make Wright a party any more than he would if it had been disclosed on the hearing that Mr. Hilliard had made a verbal agreement, void under the statute of frauds, to sell the property to some third person. I therefore think there is nothing shown in the case which should deprive the complainant of his decree.

There will, therefore, be a decree entered against the defendant.

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### JOHNSON v. THE PHILADELPHIA, WILMINGTON & BALTIMORE R. Co.\*

(Circuit Court, E. D. Pennsylvania. May 1, 1881.)

#### 1. REMOVAL OF CAUSES—CITIZENSHIP—CONSOLIDATED RAILROAD HAVING CHARTER FROM DIFFERENT STATES.

A railroad formed by the consolidation of three roads chartered respectively by three different states, cannot, when sued in the courts of one of those states by a citizen thereof, remove the case into the federal courts under the act of March 3, 1875, upon the ground that the charters obtained from the other two states gives it a foreign citizenship.

#### 2. SAME.

The P., W. & B. Railroad was chartered by the state of Pennsylvania. Subsequently, by concurrent legislation of the states of Pennsylvania, Maryland, and Delaware, it was consolidated with two other roads, chartered respectively by the latter two states, the consolidated road retaining the name of the P., W. & B. Railroad. Suit was brought by a citizen of Pennsylvania, in the courts of that state, against the P., W. & B. Railroad, who thereupon removed the case to the federal court on the ground of foreign citizenship. *Held*, that the federal court had no jurisdiction, and that the suit should be remanded.

\*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

Rule to show cause why case should not be remanded to state court.

This was an action at law, brought in a state court of Pennsylvania by Caroline Johnson against the Philadelphia, Wilmington & Baltimore Railroad Company. Defendant filed a petition for removal, under the act of congress of March 3, 1875, setting forth that defendant was a corporation formed by the union of three corporations, viz., the Philadelphia, Wilmington & Baltimore Railroad Company, which was chartered by the state of Pennsylvania, the Wilmington & Susquehanna Railroad Company, which was formed by the union of two other railroads, one chartered by the state of Delaware and the other by the state of Maryland, and the Baltimore & Port Deposit Railroad Company, chartered by the state of Maryland; that under authority conferred by concurrent legislation of the three states named, articles of union were entered into by said three corporations, by which they were united in one body corporate, under the name of the Philadelphia, Wilmington & Baltimore Railroad Company, with all the rights, privileges, and immunities which each and all of them possessed under their respective charters; and that the defendant was thus, at the time this suit was brought, a corporation chartered by and existing under the laws of the states of Pennsylvania, Delaware, and Maryland. Under this petition the case was removed to the United States circuit court. Plaintiffs then obtained the present rule to remand.

*George Haldorn*, for plaintiff.

*Thomas Hart, Jr.*, and *James E. Gowen*, for defendant.

The court, McKENNAN, C. J., and BUTLER, D. J., made the rule absolute, and directed the clerk to certify the record to the state court.

NOTE. The recent dissent of Judge Nelson in *Nashua & Lowell R. v. Boston & Lowell R.* 8 FED. REP. 458, from what he there says "seems" to have been the conclusion in the above case, renders a full report of the case important; and it is therefore published, although no written opinion has ever been filed. It is to be observed that in the above case, as well as in the later cases of *C. & W. I. R. Co. v. L. S. & M. S. Ry. Co.* 5 FED. REP. 19, and *Uphoff v. Chicago, St. L. & N. O. R. Co.* Id. 545, which followed its ruling, the consolidated railroad was sued as defendant in a court of one of the states by which it was chartered. The plaintiff had the right to treat it as a corporation of the state in which he sued, and the railroad company could not defeat that right or remove the cause by subsequently alleging a foreign citizenship under its other charters. In the Massachusetts case, however, the situation of the parties was exactly reversed; the consolidated corporation being the plaintiff instead of defendant, and having elected to sue as a foreign citizen by virtue of its foreign charter. Though an individual may insist upon suing such a corporation under the charter granted by his own state, it does not necessarily follow that he can object to being sued by it under the charter granted by a foreign state. It will be seen, therefore, by a comparison of the facts in the two cases, that the decision in the Pennsylvania case does not necessarily conflict with the decision rendered in the Massachusetts case.—[REP.]

## STEAM STONE-CUTTER CO. v. SEARS.

*(Circuit Court, D. Vermont. October 11, 1881.)*

## 1. PROCEDURE—WRITS OF SEQUESTRATION IN THE NATURE OF ATTACHMENT—LIENS.

Under its rules, this court has the power to issue writs of sequestration in the nature of attachment; and such writs, when duly served, create valid liens upon real property in this state so attached, as against a grantee with knowledge of the attachment to whom the property was conveyed *pendente lite*.

## 2. SAME—SERVICE.

Due service is service in the manner provided by the state statutes.

3. *Seemle* that the knowledge or ignorance of the grantee does not affect the validity of the levy.

In Equity.

*Prout & Walker*, for orator.

*E. J. Phelps* and *Wm. Batchelder*, for defendant.

WHEELER, D. J. The orator, as owner of a patent, brought a bill in this court against the Windsor Manufacturing Company for infringement, and obtained a decree establishing the title to and validity of the patent, the fact of infringement, and for an account of profits. After this decree, on application of the orator a writ of sequestration, in the nature of an attachment, to create a lien for satisfying the decree, was issued, and served by attaching the real estate of that defendant in accordance with statutes of the state of long standing, which enable the courts of chancery of the state to issue such process and create such liens. After this attachment, that defendant conveyed to this defendant, who had full knowledge of the attachment, a portion of the estate so attached. The orator obtained a final decree for the payment of money in the original cause, took out execution thereon, and caused it to be levied upon that estate, and caused the estate to be set out to the orator in satisfaction of so much of the execution as it would apply to, at its appraised value, agreeable to the statutes of the state in relation to levy of execution upon real estate. The defendant refuses to recognize the validity of the attachment and levy, and claims to hold the land against them. This bill is brought to confirm and enforce the orator's attachment and levy, and to obtain possession of the estate, and the cause has been heard upon bill and answer.

No question is made about the propriety or regularity of the writ of attachment issued in this case, if there was authority to issue such a writ at all; nor about the regularity of the attachment upon the writ, or the levy of the execution and setting out the estate by the

marshal, according to the laws of the state, if the attachment could effectually be so made, or the estate be so levied upon in any case in equity. The only questions made are as to whether the court has the power to issue such writs, and whether the service of such a writ in that manner created a lien that will hold until decree. It has been the practice of the court for about 30 years to issue such writs, upon cause shown, in this manner, some of which have been served by attaching real estate in this manner, but doubts have arisen latterly in respect to the legality of this course. In no case has the question arisen, so far as is known, except upon the application for the writ, and not then so as to involve appearance for the opposite party or argument. It is presented now for the first time for debate, and has been argued with thoroughness and ability upon each side.

An attempt has been made to rest these proceedings upon the general authority, usage, and practice of courts of chancery. That such courts have issued writs of sequestration from the earliest times is abundantly shown. *Hind*. 127; *Colston v. Gardiner*, 2 Ch. Cas. 44; *Francklyn v. Colhoun*, 3 Swanst. 276; *Peck v. Crane*, 25 Vt. 146. But these writs were always issued in the nature of distresses to compel appearance or performance of some decree or order, and not for the purpose of creating a mere lien upon property to be held for the satisfaction of a money decree. These proceedings must be maintained, if at all, by the force of the statute of the United States, the rules and practice of the courts in pursuance thereof, and the laws of the state adopted thereby; although the practice of courts of chancery, both ancient and modern, is to be looked into for the purpose of understanding and applying these statutes and rules.

The statutes of the United States make a distinction between common-law causes and equity and admiralty causes as to provision for process, and forms and modes of procedure. For the former, the practice, proceedings, and remedies by attachment and execution of the courts of the states are adopted. Rev. St. §§ 914, 915, 916. For the latter, it is merely provided that—

“The forms of mesne process, and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction, in the circuit and district courts, shall be according to the principles, rules, and usages which belong to courts of equity and of admiralty respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts respectively, and to regulation by the supreme court, by rules prescribed from time to time to any circuit or district court, not inconsistent with the laws of the United States.” Rev. St. § 913.

—And that the circuit and district courts shall have power to issue all writs necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. Section 716. There are no provisions in the statutes for execution upon decrees in equity or admiralty causes, and none for liens thereby, except that it is provided that—

“Judgments and decrees rendered in a circuit or district court, within any state, shall cease to be liens on real estate or chattels real in the same manner and at like periods as judgments and decrees of the courts of such state cease, by law, to be liens thereon.” Section 967.

Still, decrees in equity and in admiralty, in the circuit and district courts, become liens upon the lands of defendants therein in states where like decrees of the state courts become such liens, the same as the decrees of the state courts do. *Ward v. Chamberlain*, 2 Black, 430. And suits *in personam* in admiralty may be commenced by attachment of the property of the libellee, to be held to answer the demand. *Manro v. Almeida*, 10 Wheat. 473. These remedies rest upon the principles and usages which belong to such courts, and the rules of the courts respectively, and not upon any express provision of the statutes. And in giving construction to the statute prescribing those principles and usages as guides of procedure, reference is to be had to the practice of those courts in this country as grafted upon the English practice. This was expressly laid down as to admiralty proceedings, in *Manro v. Almeida*. The form of the writ of execution in equity cases, upon decrees for the payment of money, has been provided by the supreme court, in equity rule 8, and no other provision is made in those rules in regard to such executions. All the rest is left to the circuit and district courts. This court provided, by rule 11, that “the creation, continuance, and termination of liens and rights created by attachment of property, or the arrest of a defendant, shall be governed by the laws of this state.” This state has, and has had almost from its organization as a state, the English equity system with its jurisdiction vested in courts of chancery, and those courts have had the power from nearly as early a period to issue writs of attachment like the one in question, having the force and effect claimed in behalf of this one. Such writs were within the principles and usages belonging to those courts. Such a writ of attachment was as well settled in the jurisprudence of the state as belonging to the courts of equity, as attachments upon mesne process were settled to belong to the courts of common law. The rules of this court are not divided into rules in equity and rules at law at



all, but are all together in one body, and left to operate on the law side or equity side of the court as they may be applicable. The laws of the state, adopted by this rule, are as applicable to equity cases as they are to common-law cases, and, not being restricted by the rule to either, must have been intended for both. This rule covers the issuing and force of this writ. The power to make such a rule in cases where the supreme court has not acted is as well conferred as the power of that court to make rules for the circuit and district courts is. The language conferring it is as explicit, and comes from the same authority. In *Beers v. Haughton*, 9 Pet. 329, Mr. Justice Strong said:

"State laws cannot control the exercise of the powers of the national government, or in any manner limit or affect the operation of the process or proceedings of the national courts. The whole efficacy of such laws in the courts of the United States depends upon the enactments of congress. So far as they are adopted by congress they are obligatory. Beyond this they have no controlling influence. Congress may adopt such state laws directly by a substantive enactment, or they may confide the authority to adopt them to the courts of the United States. The constitutional validity and extent of the power thus given to the courts of the United States to make alterations and additions in the process, as well as in the modes of proceeding in suits, was fully considered by this court in the cases of *Wayman v. Southard*, 10 Wheat. 1, and *Bank of U. S. v. Halstead*, 10 Wheat. 51. The result of this doctrine, as practically expounded or applied in the case of *Bank of U. S. v. Halstead*, is that the courts may, by their rules, not only alter the forms, but the effect and operation of the process, whether mesne or final, and the modes of proceeding under it."

In *Bank of U. S. v. Halstead*, it was held that the law of the United States, authorizing the courts of the United States to alter their processes, authorized them to so alter them as to make lands subject to execution which were not so subject under state laws. The objection was made there, as it had been in *Wayman v. Southard*, that congress could not delegate such powers to the courts, because they were legislative powers.

In *Wayman v. Southard*, Chief Justice Marshall said, as to this objection:

"If congress cannot invest the courts with the power of altering the modes of proceeding of their own officers, in the service of executions issued on their own judgments, how will gentlemen defend a delegation of the same power to the state legislatures? The state assemblies do not constitute a legislative body for the Union. They possess no portion of that legislative power which the constitution vests in congress, and cannot receive it by delegation."

In *Bank of U. S. v. Halstead*, Mr. Justice Thompson said:

"If the alterations are limited to mere form, without varying the effect and operation of the process, it would be useless. The power here given, in order to answer the object in view, cannot be restricted to form, as contradistinguished from substance, but must be understood as vesting in the courts authority so to frame, mould, and shape the process as to adapt it to the purpose intended. The general policy of all the laws on this subject is very apparent. It was intended to adopt and conform to the state process and proceedings, as the general rule, but under such guards and checks as might be necessary to insure the due exercise of the powers of the courts of the United States. It is said, however, that this is the exercise of legislative power which could not be delegated by congress to the courts of justice. But this objection cannot be sustained. There is no doubt that congress might have legislated more specifically on the subject, and declared what property should be subject to executions from the courts of the United States. But it does not follow that because congress might have done this they necessarily must do it, and cannot commit the power to the courts of justice."

These authorities well establish the validity of the rule of this court regulating attachments. It is strenuously contended in behalf of the defendant that if this writ was valid its service, which was by copy of the writ and return of attachment upon it lodged in the town clerk's office where the land records are kept, without possession, was not, and that it did not create any lien upon the land. If this was strictly a sequestration this point would be well taken; but it is not, although it is called so to some extent. A sequestration is intended to accomplish its object by the actual taking of goods and chattels, or the rents and profits of lands, and withholding them until the distress brings compliance with what is then required, and it creates no lien in favor of future judgments or decrees, while an attachment creates such a lien and nothing more. This is in effect strictly an attachment to create a lien, and is so understood in the laws of the state adopted by the rule. *French v. Winsor*, 36 Vt. 412. The creation of the lien provided for by the rule includes as well the mode of service as the issuing of the writ, and adopts the state law for both purposes. Besides, if the writ was valid, and there was no law or rule providing any mode of service, the return upon the process of an attachment of land would be sufficient without any taking possession or entry upon the land by the officer. *Taylor v. Mixer*, 11 Pick. 341. And this argument would prove too much; for, if the rules of court did not provide for the service of executions in equity cases, there would be no provision at all for that purpose, nor, in fact, for issuing executions in such cases. Executions are satisfied by levy on land only by appraisal and setting out the land to the creditor under the state

laws, which make specific provision for that purpose in this state; and if that mode was not adopted by the rules of the courts in equity, and the statutes of the United States in common-law cases, there would be no way to levy executions issuing out of the United States courts upon lands within this state. Still, if this land had not been conveyed, and the record title had stood in the execution debtor, it probably would not be contended but that upon a decree for the payment of money an execution could be taken out and satisfied by levy upon the land, as was done.

It was said in argument that such a rule could no more be made here than it could where attachments upon mesne process are not known, which may be true, but the effect of it, and of all such rules, in either place is limited to the continuance of liens by decrees in the state courts, by the statute before mentioned. Rev. St. § 967. The effect of the whole is to keep the liens in proceedings in the United States courts within the same bounds as in those of the state courts, according to the policy of the laws of the United States, as stated by Mr. Justice Thompson in *Bank of United States v. Halstead*, as before quoted. These proceedings are according to the principles, practice, and usages of courts of equity as they obtain within the state, and as the same have been recognized by this court by granting such writs for many years, some of which have been served in the same manner as this. That practice is entitled to great weight on account of the learning and character of the judges adopting it, and on account of its effect in showing the cases to which the rules were understood to apply. Chief Justice Marshall, in speaking of the legality of an arrest by the marshal in Connecticut, and commitment to jail without a *mittimus*, as required by the laws of the state, said: "The uniform course of that court from its first establishment, dispensing with this *mittimus*, may be considered as the alteration in this particular which the court was authorized by law to make." *Wayman v. Southard*, 10 Wheat. 1. These authorities and considerations lead to the conclusion that this lien was valid, and that the levy transferred the title to this land to the orator. This conclusion is reached with less reluctance because the defendant knew of this attachment, and purchased at a time when, so far as appears, all supposed it to be valid, and when he could protect himself against it by any provision he might require. The doubts which afterwards arose were shared in by the court, and the issuing such writs has since been avoided where the service of them might expose the marshal to suit for taking property, or the refusal by him to take property

on them to prosecution for neglecting to serve them, until the question of their validity should arise, so that it could be directly argued and determined. This argument and examination has removed these doubts.

Let there be a decree establishing the validity of the attachment and levy according to the prayer of the bill, with costs.

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*In re* APPOINTMENT OF SUPERVISORS OF ELECTION.

(Circuit Court, S. D. New York. October 5, 1881.)

1. SUPERVISORS—REPRESENTATIVE ORGANIZATIONS.

The rule, in case a question arises in respect to what political organization should be recognized by the court in appointing supervisors under the Revised Statutes, is that the organization which was recognized by the last state convention of the party is entitled to be considered as its representative organization; subject, however, to modification by a change of circumstances. *Held, therefore*, that in the light of events that have occurred since the last state convention of the democratic party, the organization known as "The New York County Democracy" will be regarded as now representing the democratic party in the city and county of New York.

*William C. Whitney*, for the New York County Democracy.

*Charles W. Brooke*, for the Democratic Organization of the City and County of New York.

BLATCHFORD, C. J. The requirement of section 2012 of the Revised Statutes is that the two supervisors of election, in each election district, "shall be of different political parties." By section 2026 the chief supervisor of elections is required to receive the applications of all parties for appointment as supervisors of election, and to present such applications to the judge, and furnish information to him in respect to the appointment by the court of such supervisors of election. A question has now arisen as to who shall be appointed supervisors from the democratic party in the city of New York, at the coming election, in two congressional districts. Applications are made by persons belonging to an organization called "The New York County Democracy," and also by persons belonging to an organization called "The Democratic Organization of the City and County of New York." The former organization has come into existence since the last democratic state convention was held. Delegates representing "The Democratic Organization of the City and County of New York" were recognized and admitted to seats at the last democratic state convention, and were the only delegates recognized by the con-

vention as representing the democratic party in the city and county of New York.

Whenever a question has arisen heretofore in respect to what political organization should be recognized by the court in appointing supervisors, as entitled to be considered as the regular representative organization of the political party, the practice has been to recognize that one which was recognized by the last state convention of the party. It has been thought wise to recognize some one organization as entitled to represent the political party, and to ask that members of its organization, recommended by it, and those only, provided they were fit and proper persons, and met the requirements of the statute, should be appointed the supervisors from such political party; and no rule more likely to effect a just result, and to meet with general acquiescence, could be suggested than the one above referred to. But, like every general rule, it must be modified by a change of circumstances. If such general rule were to be applied to the present case, without reference to any circumstances which have transpired since the last democratic state convention was held, the organization called "The Democratic Organization of the City and County of New York" would be recognized as the regular representative organization of the democratic party in the city and county of New York; but it has been made clearly to appear to the court that, since the last democratic state convention was held, such proceedings have been duly and regularly had, by proper and authorized representatives of "The Democratic Organization of the City and County of New York," that, although that organization may still formally exist, the new organization called "The New York County Democracy" must be regarded as representing it and its members, and as the only organization now recommending persons to be appointed as supervisors from the democratic party, which ought to be recognized by the court as the regular representative organization of the democratic party in the city and county of New York. Therefore, the persons recommended by the organization called "The New York County Democracy" will, if fit and proper persons, and meeting the requirements of the statute, be appointed by the court as supervisors from the democratic party.

## RECTOR'S CASE.

(Circuit Court, D. Arkansas. July, 1881.)

1. ACT OF MARCH 3, 1877—EFFECT TO BE GIVEN TO THE DECISION OF THE COMMISSIONERS.

The decision of the commissioners, appointed under the provisions of the act of congress of March 3, 1877, entitled "An act in relation to the Hot Springs reservation in Arkansas," is in the nature of a final adjudication, and one binding upon the parties, so far as it pertains to matters specified in the act.

McCRARY, C. J. Two questions have been discussed by counsel in this case, to-wit: *First*. Whether the decision of the commissioners appointed under the provisions of the act of Congress of March 3, 1877, entitled "An act in relation to the Hot Springs reservation in Arkansas," upon questions of law and fact submitted to them, in accordance with the terms of the act, is in the nature of a final adjudication, and conclusive upon the parties. *Second*. Whether, assuming that this court may pass upon the correctness of the decisions of that commission, the same ought, upon the merits, to be declared erroneous and set aside.

The act of March 3, 1877, deal with the Hot Springs reservation as a part of the public lands of the United States, but at the same time it provided, as we shall see, for ascertaining and protecting the right of occupants and claimants with respect to improvements. The act provided for the appointment, by the president, of three discreet, competent, and disinterested persons, who shall constitute a board of commissioners, with authority to perform and discharge the duties specified by the act. The commissioners were required to take and subscribe the usual oath for civil officers, to sit at the springs, to give notices of their meetings, and to organize by electing one of their number as chairman. The fifth and sixth sections of said act are as follows:

"Sec. 5. That it shall be the duties of said commissioners to show, by metes and bounds on the maps herein provided for, the parcels or tracts of lands claimed by reason of improvements made thereon, or occupied by each and every such claimant and occupant on said reservation; to hear any and all proof offered by such claimants and occupants, and the United States, in respect to said lands, and in respect to the improvements thereon; and to finally determine the right of each claimant or occupant to purchase the same, or any portion thereof, at the appraised value, which shall be fixed by said commissioners; provided, however, that such claimants and occupants shall file their claims, under the provisions of this act, before said commissioners, within six calendar months after the first sitting of the said board of commissioners, or

their claims shall be forever barred; and no claim shall be considered which has accrued since the twenty-fourth day of April, 1876.

"Sec. 6. That the said commissioners shall have power to compel the attendance of witnesses and the production of papers touching the occupancy or improvements of or on said lands, or any other matter in anywise belonging or appertaining either to the said lands or the improvements thereon; shall have power to examine, under oath, all witnesses that shall come before them, and all testimony shall be reduced to writing and preserved, as hereinafter provided."

Counsel for complainant have insisted in argument that the decisions of the commission are of no higher character than those of the officers of the land department, which may be set aside by a court of competent jurisdiction, on the ground of fraud, mistake, or misconstruction of the law. *Moore v. Robbins*, 96 U. S. 530; *Johnson v. Towsley*, 13 Wall. 91. But it is manifest that congress intended to clothe this tribunal with extensive judicial powers. There is a broad distinction between its functions and those of the officers of the other branch of the executive departments referred to. The usual powers of a court of justice were conferred upon the commission. It was to organize by electing a presiding officer, and to give notice of its sessions. Parties claiming the right to purchase any portion of the lands were required to appear before it. It was clothed with power to compel the attendance of witnesses and to administer oaths; and it was to "finally determine the right of each claimant or occupant to purchase the same (the land) or any portion thereof at the appraised value." It is not to be supposed that congress created this commission and clothed it with all these powers merely for the purpose of creating it to perform the ministerial functions usually devolving upon an officer of the land department. The language of the act and the surrounding history and circumstances alike forbid such an interpretation. It was time to have an end to controversy. For half a century the courts and legislatures of states and nation have been vexed with this dispute. The questions of title have been finally settled. Congress resolved through the commission to have a final settlement of all questions as to improvements and the right to purchase the title; and so it was provided that the commission should "finally determine" these questions. This language, when applied to a special tribunal, must be held to mean a final determination in the absolute sense, although similar language, if applied to officers of the land department, might be final only so far as departmental action is concerned. The rule of law above stated, relied upon by counsel for

complainants, therefore, does not apply. The following rule does apply: "Where the law has confided to a special tribunal the authority to hear and determine certain matters, the decision of that tribunal, within the scope of its authority, is binding upon all parties." *Johnson v. Towsley*, 13 Wall. 83; *Lytle v. Arkansas*, 9 How. 333; *Boatner v. Ventress*, 8 Martin, N. S. (La.) 330. I am clearly of the opinion that the proceedings before the commission were in their nature judicial; that its jurisdiction, though limited and special, was plenary with respect to the particular matters specified in the act; and that its decisions upon those matters is an adjudication which cannot be attacked in the present proceedings. This conclusion disposes of the demurrer, independently of the question whether the commission erred in its decision upon questions of law. I am, however, of the opinion that the statute authorizes the finding.

Demurrer sustained.

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KENNEDY v. HARTRANFT, Collector.

(Circuit Court, E. D. Pennsylvania. October 18, 1881.)

1. **TARIFF LAWS—CLASSIFICATION OF ARTICLES—BURDEN OF PROOF.**

Where a collector classifies an article under a different name from the designation of it on the invoice, the burden is upon the government to show that his classification is proper.

2. **SAME—INTERPRETATION OF WORDS—TRADE TERMS.**

Where terms employed in the tariff laws have a special restricted meaning, according to the general usage of the trade to which the articles appertain, it is to be presumed that congress used them in such restricted sense; but the fact that they have such restricted meaning must be clearly established, otherwise they are to be interpreted according to their common, popular signification.

3. **SAME—HOOP IRON—ACT OF JUNE 30, 1864.**

The words "all hoop iron," as used in the act of June 30, 1864, subsequently incorporated in section 2504, Rev. St., includes not only hoop iron in strips of from 30 to 60 feet in length as it comes from the rolls, in which form it is usually bought and sold, but also all lengths of hoop iron not changed by manufacture into a new and distinct article.

4. **SAME—MANUFACTURE OF IRON.**

If, however, hoop iron has been subjected to such mechanical treatment as to convert it into an article fitted for a special use, without any further mechanical treatment, and unfitted for the general purposes to which hoop iron is adapted, such article is a manufacture of iron, dutiable as such, and not as hoop iron.

5. **SAME—COTTON TIES.**

The above principles applied to an importation of cotton ties consisting of bands of iron 11 feet long, painted and accompanied by buckles, the bands being put up in bundles of 30, with 30 buckles strung upon one band.



This was an action at law brought by Logan P. Kennedy, a citizen of Kentucky, against John F. Hartranft, collector of customs of the district of Philadelphia, to recover an excess of duty claimed to have been exacted on about 9,000 bundles of cotton ties imported by plaintiff into the port of Philadelphia in August, 1880. The articles imported were bands of iron, each 11 feet long, painted and accompanied by a buckle. They were put up in bundles of 30 bands, with 30 buckles strung on one band. The collector claimed that they were hoop iron, and collected the duty of one and a half cents per pound imposed on that article by section 2504, Rev. St. Plaintiff claimed that they were manufactures of iron, and as such subject only to the duty of 35 per cent. *ad valorem* imposed by the same section on all manufactures of iron not otherwise provided for.

The case was tried October 18, 1881, before *McKenna*, C. J., and *Butler*, D. J. The testimony of plaintiff's witnesses was to the effect that prior to and since the passage of the act of June 30, 1864, (13 St. 202,) on which the portions of section 2504 of the Revised Statutes in controversy were founded, "hoop iron," as it was understood in the trade, meant long strips of iron, from 30 to 60 feet in length, as it came from the rolls, fitted for no special purpose, but suitable to be manufactured and used for a variety of purposes; that a cotton tie consisted of a band of iron 11 feet long, painted to prevent rust, and fitted with a buckle, either riveted to it or detached from it; that whether the buckle was riveted or detached, the tie was ready for immediate use for baling cotton, the band being passed around the bale, the ends bent into loops, and the loops slipped into the buckle, where they were tightened and securely held by the expansion of the bale; that cotton ties were a distinct article of commerce not dealt in by dealers in hoop iron; that their short length and the paint upon them rendered them unfit for the general purposes of hoop iron, and that they could not be used for such purposes without burning off the paint and cutting them to new lengths, at a pecuniary loss.

The testimony of defendant's witnesses was to the effect that the term "hoop iron" had no restricted trade meaning, but prior to and since the act of 1864 it was used in the trade in its general significance, comprehending all kinds and lengths of hoop iron, irrespective of the purpose for which it was intended to be used; that a cotton tie was simply a piece of hoop iron, painted, and in the opinion of the witnesses was not a separate manufacture; that it was made by the manufacturers of hoop iron, who included it under the designation of hoop iron, and considered it as simply one of the various forms in which such iron was furnished; and that after cotton ties had been used to bale cotton they were sold and used for various purposes to which hoop iron was applied, although at a greatly reduced price.

*Frank P. Prichard* and *George Tucker Bispham*, for plaintiff, cited to the court *In re 200 Chests of Tea*, 9 Wheat. 430; *Barlow v. U. S.* 7 Pet. 404; *Curtis v. Martin*, 3 How. 106; *Lawrence v. Allen*, 7 How. 785; *U. S. v. Hathaway*, 4 Wall. 404; *U. S. v. Quimby*, 4 Wall. 408; *Arthur v. Cumming*, 91 U. S. 362; *Arthur v. Morrison*, 96 U. S. 108; *Graham v. Collector*, U. S. C. C. at New Orleans, July, 1868,

(unreported;) *Ranlett v. Collector*, U. S. C. C. at New Orleans, January 26, 1881, (unreported.)

*John K. Valentine*, U. S. Dist. Atty., for defendant, cited *U. S. v. Kid*, 4 Cranch, 1; *U. S. v. Potts*, 5 Cranch, 286; *U. S. v. Sarchet*, Gilpin, 273; *Bruce v. Murphy*, 10 Blatchf. 230; *Maillard v. Lawrence*, 16 How. 257; *Leng v. Murphy*, U. S. C. C. at New York, April 9, 1874, (unreported;) *Ranlett v. Collector*, U. S. C. C. at New Orleans, January 26, 1881, (unreported.)

McKENNAN, C. J., (*charging jury*.) The plaintiff imported into the port of Philadelphia, in several vessels, a considerable quantity of iron, invoiced as cotton ties. That iron was treated by the collector of the port of Philadelphia, who is the defendant in this case, as hoop iron, was classified as such, and he exacted from the plaintiff the duty which is imposed upon hoop iron. The plaintiff paid that duty under protest, and took the necessary steps to enable him to bring a suit for the recovery of the excess of duty, if an excess of duty was charged by the collector. The United States having classified this article differently from the invoice designation of it, and imposed a higher duty upon it than it would otherwise have been subjected to, the burden of proof is upon the United States to satisfy you that there has been a proper classification of this article by the collector, and that the rate of duty imposed by law only was exacted by him. What, then, is the proper classification of the article in question, so as to ascertain the duty to be imposed by law? As I have already remarked, it was classified as hoop iron under this clause of the tariff act of the thirtieth of June, 1864: "All band, hoop, and scroll iron from one-half to six inches wide, under one-eighth of an inch in thickness, and not thinner than No. 20 wire gauge, one and one-half cents per pound."

Now, we must, in the first place, determine what is the meaning of the language of that act; and here I may say that the words employed in all laws are to be received in their common, popular signification. Thus interpreting this act there can be no doubt as to the meaning of these terms, "all hoop iron." It is not certainly confined to hoop iron of any particular length, but it is to be classified according to its character—whether it is hoop iron or not—irrespective of its length. It is claimed here, however, that this act has not that comprehensive signification and meaning, but that these words have a special and restricted commercial sense, in which sense it is to be presumed they were used by congress. Now, it is a rule of construction undoubtedly that, where terms employed in an act of congress

have a special meaning according to the common understanding and usage of the trade to which the article appertains, presumptively congress used the term in such restrictive sense. But you must be satisfied from the evidence in the cause that there was such a general restrictive meaning given to these words in the trade that there could be no doubt that they included only hoop iron or band iron; that not only was this term used generically to describe hoop iron, but that it excluded any other form of hoop iron than such as it is claimed here this term commercially is to be restricted to the description of; that evidence is that the term hoop iron ordinarily is used to describe pieces of hoop iron which are put up in bundles and lengths just as they come out of the rolls, and which contain 56 pounds, and that generically such an article is described as hoop iron in a commercial sense.

But, gentlemen, in order to fix this meaning to such a term, and to change the popular meaning of the term employed in the act of congress, you must be satisfied that such is the restricted sense given to the word by the universal understanding of the trade in which the term is employed; and, besides that, that it is exclusively descriptive of the article to which the witnesses here have said it is generically applied. Now, is there evidence upon which you can come to the conclusion that this word is used in that restrictive sense in this act of congress? As I have already remarked, it must be shown by the evidence beyond doubt that such is the general signification of the term as given to it by the use in the trade. Now, have you such evidence here? If I recollect the testimony aright, there is a very serious difference among the witnesses. Some of them testify that hoop iron—very few of them before 1864—was descriptive of a bundle of iron as I have already described, and others say that it was not. So that, unless you are clearly satisfied from all the evidence that hoop iron had this restricted sense according to commercial usage, the commercial signification of it will not be so fixed as to authorize the presumption that this word was used in any other sense by the act of congress than according to the popular meaning.

But, gentlemen, the act of congress is a little broader than that. It seems clearly to contemplate something more than one kind of hoop iron. If it said hoop iron, and such was the restrictive sense, and such was satisfactorily established before you by the weight of testimony, it might possibly be proper for you to presume that congress used the term in that restrictive sense. But "all hoop iron"

would seem to exclude the inference that even one kind of iron, which is generically described as hoop iron according to the testimony of the witnesses, was not intended to be confined to it. There can be no doubt at all that iron cut into lengths of 12 feet or 15 feet or 20 feet or 11 feet is a species of hoop iron until it is so changed as to transform it into something else than hoop iron. So that I have no doubt that, under a proper construction of this act, the article imported here fell within the designation of the act as hoop iron, and, without anything more, was subject to the duty which was charged upon it by the collector, and I so instruct you that you are to regard this, as far as the commercial description of this article is concerned, as embraced within the terms of the act of 1864.

Now, has it been taken out of this classification and placed in some other? This is the material question. If it was proper to so classify it, then the duty was properly imposed upon it. If it has been changed, and was not hoop iron in the sense in which this term was used by congress, and was placed in some other category, then the duty was illegally exacted, and the plaintiff is entitled to recover.

Now, it is claimed here that it is a manufacture of iron—that is to say, that it is a fabric made out of hoop iron; not that it is not iron by being changed in form, but that it is something which is made out of iron, and therefore is a manufacture of iron.

Now, is this a manufacture of iron? You have had the case before you, and it is important that you should look at it carefully in order to determine the question which I have just stated. It was imported in bundles made of pieces of this length, [exhibiting a strap,] with the ends turned over as these are, or 30 pieces with 30 buckles attached, or I should say 30 buckles attached to one of the pieces, but evidently intended that one buckle should be used for each band. It is, therefore, alleged to be a cotton tie. Now, in order to take it out of the category first referred to, and to place it in the list of manufactures, it is necessary that something should be done to it; that it should have been subjected to such manipulation as would completely fit it for some special purpose, and that would, to that extent, unfit it for the general purposes to which hoop iron is adapted. Now, has it been subjected to such treatment? According to the testimony of all the witnesses, while it is in this form it is a cotton tie. Now, what was necessary, gentlemen? What further mechanical treatment than such as it received was necessary to make this a complete cotton tie? That is a fact for you to determine on the evidence.

According to the testimony, to make a complete cotton tie you take iron, cut it into 11-feet lengths, paint it, and put a fastening or buckle on it. It is then fitted for use, although it may not actually be put around the cotton bale. Still, if it is fitted for such application, and no further mechanical treatment is needed, it is a cotton tie. The application of it to the bale is another thing, and does not at all concern the mechanical treatment or construction. So that it is for you to decide, under the evidence here, and upon the inspection of the article itself, whether or not this was a fabric of iron, and therefore a manufacture under the meaning of the portion of the tariff act to which I have called your attention. If it was, then it was not subject to the duty charged upon it, and the plaintiff would be entitled to recover the excess.

I do not deem it necessary to discuss the evidence in this case. I think the question is a very simple one, and I think it is for you to apply the evidence, and to use your own eyes in coming to a conclusion.

This is the condition in which the article is brought in, [exhibiting tie.] Because the buckle is attached to one piece does not make the slightest difference. The buckles were evidently intended one for each separate piece, and can be so treated.

Now, taking this piece of iron 11 feet long, painted and with a buckle attached to it, does it need any further mechanical treatment to fit it for use as a cotton tie, and to be applied to a cotton bale? If it does not, then it is a manufacture within the meaning of the act, and more than the regular duty authorized by law was exacted. That is the testimony of the witnesses; but, as I say, I do not intend to advert to that any further than simply to indicate what the testimony may be made to include in reference to this matter. But it is not improper to say that, in the judgment of the court, that is the undisputed evidence; that when this tie is taken and the ends bent around and the buckle put on it, it is a complete cotton tie, and may be used for bailing cotton. If it is such, then I say the plaintiff is entitled to recover.

A number of points have been presented here, only two or three of which I propose to notice, because I do not deem any more necessary. *First*, the plaintiff has asked the court to instruct the jury that if they find from the evidence that the articles are prepared for a special use, and that their use is fixed by the preparation which has been completed, so that naturally and economically they can be used for

no other purpose, then they belong to the class of manufactures not otherwise provided for; that is, they are cotton ties. The court so instructs you upon this point.

The defendant has put the converse of that proposition: If the jury find that the hoops and bands of iron are not such a manufacture as to be known and distinguished as a manufacture of iron, they should find for the defendant. You are so instructed.

The eleventh point presented by the defendant is substantially the same thing: To constitute the material in question a manufacture within the meaning of the act of 1864, the jury must find that it is a completed product ready for the use for which it was designed, without any further manipulation or any more work being done upon it, or any change being made upon it to fit it for that use.

That point is answered as follows: To withdraw the article in question from the category of hoop iron, the jury must be satisfied that it has been so manipulated as to change its distinctive character, not as to the material of which it is made, certainly, because in one sense it is hoop iron; but whether it is a thing made out of hoop iron, or hoop iron in its original condition, converted into a completed fabric of iron, and thus prepared and ready for some special use, and so unfitted for economical employment in the ordinary general use to which hoop iron may be applied without further mechanical manipulation, is another question.

Now, gentlemen, I repeat that, in the judgment of the court, the only material inquiry for you here is whether this article has been subjected to such mechanical treatment as to fit it completely for the special use for which it was designed; that is, baling cotton. It is not necessary that it should be put around a cotton bale and fastened to it to make it complete. If it was completely prepared for that use, so that it could be used by the person who wished to put it around cotton bales, and needed no further mechanical treatment, then it was a completed fabric, and a manufacture within the meaning of the act of congress, and so subject to a less duty than that exacted, and the plaintiff is entitled to recover. That is the simple question; and as you decide that you decide this case, and find for the plaintiff or the defendant.

If you find for the plaintiff and determine that this is a complete article of manufacture, you will assess the damages by allowing to the plaintiff what is agreed to have been the excess of duty charged by the collector. In the Indiana case the amount is agreed to be

\$1,959.47; in the Lord Clive, \$933.72; and in the Lord Gough, \$816.48.

But if you are of opinion that this is not a complete fabric made out of hoop iron, of course your verdict will be for the defendant. The case is with the jury.

The jury rendered a verdict for plaintiff for \$3,970.20, the full amount claimed, with interest.

NOTE. The above charge is reported in full because the principles laid down are of considerable importance in the construction of the tariff laws. The particular question involved is one which has been the subject of controversy for many years. In 1868 the treasury department held that all cotton ties (except one known as Beard's Patent Lock Tie) were dutiable as hoop iron. Shortly afterwards the case of *Graham v. Collector*, (not reported,) involving the question of duty on cotton ties, was tried in the United States circuit court at New Orleans, and a decision rendered in favor of their classification as manufactures of iron. The treasury department thereupon changed its ruling, and admitted them as manufactures of iron. In 1880 the department again changed its ruling and refused to admit cotton ties as manufactures if the buckles were loose, but admitted them if the buckles were riveted on. In January, 1881, the case of *Ranlett v. Collector*, (not reported,) involving the question of duty on cotton ties with loose buckles, was tried in the United States circuit court at New Orleans, and resulted in favor of the importer. The treasury department, however, refused to modify the ruling. Afterwards an appeal was made by the home manufacturers to Secretary Sherman to extend the ruling of the department so as to include cotton ties with riveted buckles in the category of hoop iron. The secretary, however, in a published letter of January 26, 1881, refused the application. A similar application was made upon the accession of Secretary Windom, but he, in a published letter of May 9, 1881, adhered to the decision of his predecessor. An appeal has been taken by the government in the case of *Ranlett v. Collector*, *supra*, and it is understood that an appeal will be taken in the present case, so that the question will ultimately be settled by the highest tribunal.

In connection with this subject may be mentioned the case of *Leng v. Arthur*, (not reported,) tried in 1868, in the circuit court for the southern district of New York, wherein a verdict was rendered in favor of an importer who imported hoop iron cut to lengths and punched with holes, for barrel hoops, and who claimed that these were manufactures of iron. The department for some years followed this decision, but afterwards, in 1880, assessed all such cut hoops as hoop iron. See, also, the opinion of Atty. Gen. Devens, in Op. of Atty. Gen., vol. 16, page 660.—[REP.]

UNITED STATES *v.* MURPHY.\*

(Circuit Court, S. D. Ohio, W. D. October, 1881.)

1. INMATES OF SOLDIERS' HOMES—NOT IN MILITARY SERVICE OF UNITED STATES—INDICTMENT FOR APPROPRIATING CLOTHING OF INMATES—REV. ST. §§ 5438, 5439.

Inmates of the National Military Home at Dayton, Ohio, are not in the military service of the United States, and clothing issued to them is not used in such service. *So held*, on demurrer to an indictment under section 5439, Rev. St., charging the defendant with applying to his own use an overcoat which had been issued to an inmate of such home.

On Demurrer to Indictment.

*Samuel Craighead*, for the demurrer.

*Channing Richards*, U. S. Dist. Atty., *contra*.

SWING, D. J. The indictment is drawn under section 5439 of the Revised Statutes. The two counts, differing somewhat in form, charge that the defendant has applied to his own use an overcoat which had been issued to an inmate of the National Military Home at Dayton, to be used by him for the military service of the United States. A demurrer to this indictment raises the question whether clothing so issued to inmates of that institution is within the prohibition of that section. The preceding section (5438) prohibits the purchase of clothing, etc., from any soldier or other person called into or employed in the military service of the United States, such soldier or person not having the lawful right to sell the same. This section (5439) then prohibits any person from knowingly applying to his own use any clothing or other property of the United States furnished or to be used for the military service. Under section 5438 the clothing must be purchased from a person "in the military service;" under section 5439 it must be clothing or other property of the United States "furnished or to be used for the military service." The indictment, it is true, charges in one count that the overcoat in question was "furnished for the military service," and in the other that it was "to be used for the military service," but in each it appears it had been issued to an inmate of the home.

It was claimed in argument on behalf of the government that these military homes are a part of the military establishment, and clothing issued to the inmates is furnished and used for the military service. It is clear that the inmates of these homes are not in the military

\*Reported by J. C. Harper, Esq., of the Cincinnati bar.



service. It is not claimed that section 5438 applies to the purchase of clothing from them; nor do I think that the clothing issued to them is used in the military service of the United States.

Congress could probably prohibit the purchase of clothing from these inmates, and punish any one applying it to other purposes than that for which it is issued; but the law in force does not apply to it, and the demurrer must be sustained.

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*In Re McKenna, Bankrupt.*

(District Court, W. D. Tennessee. September 30, 1881.)

**1. HUSBAND AND WIFE — SETTLEMENT ON THE WIFE — HUSBAND'S INTEREST — CONSTRUCTION.**

It is a general principle, established by the authorities, that whenever a settlement is made upon a married woman by will, deed, or other conveyance, or by statute, the husband's interests are unaffected, further than the terms of the instrument or statute, either directly or by necessary implication, require; and it is well-settled that neither exclusion during the life of the wife from the rents and profits, restrictions upon his powers of alienation, or the grant to her of powers of alienation, act to destroy his interest after her death, unless the settlement explicitly does so by appropriate terms, or by the exercise of the powers conferred his interest is defeated during her life.

**2. SAME SUBJECT—BANKRUPTCY—TENANCY BY THE CURTESY—TENNESSEE CODE, §§ 2481, 2482—PROPERTY EXEMPT—REV. ST. § 5045—ASSIGNEE'S TITLE—SUBSEQUENTLY-ACQUIRED PROPERTY.**

A state statute provided that the interest of a husband in the real estate of his wife should not, *during her life*, be sold or disposed of by virtue of any judgment, decree, or execution against him, nor should the husband and wife be ejected or dispossessed of the real estate of the wife by virtue of any such judgment, sentence, or decree, nor should the husband sell his wife's real estate during her life without her joining in the conveyance in the manner prescribed by law in which married women shall convey lands. The wife was seized of lands when the husband became bankrupt, there being issue of the marriage. *Held*, that the tenancy by the curtesy *initiate* passed to the assignee in bankruptcy, subject to the statutory right of the husband and wife to continue to hold the land during her life. *Held, also*, that this state statute and the bankruptcy act did not exempt from the operation of the bankruptcy the whole tenancy by the curtesy for the life of the husband, but only so much as was measured by the life of the wife, and that on her death, pending the bankruptcy proceedings, the assignee was entitled to take the land for the remainder of the husband's life. *Held, further*, that there is nothing in the character of the estate of the husband in his wife's lands at common law, nor as modified by this statute, to prevent its passing to the assignee, subject to the statutory exemption during the wife's life, and that neither at common law nor under the statute was it property acquired by the death of the wife subsequently to the bankruptcy.

## 3. PRACTICE—SUMMARY PETITION—PARTIES.

A summary petition by the assignee to recover possession of land withheld by the bankrupt is the proper remedy, and a plenary suit is not necessary; nor are the children of the bankrupt and his wife, who are entitled to the reversion after a tenancy by the curtesy ceases, necessary parties to a petition by the assignee to recover that estate from the bankrupt.

## 4. REPEAL OF THE BANKRUPTCY LAWS—PROVISO—JURISDICTION.

The proviso to the act of congress of June 7, 1878, *c.* 160, (20 St. 99,) makes ample provision for continuing the jurisdiction of the court over pending cases.

Petition by the assignee in bankruptcy stating that, at the date of the petition in bankruptcy, the wife of the bankrupt was the owner of certain lands of which she and the bankrupt were then in possession; that children were born of the marriage, and pending the proceedings in bankruptcy the wife had died; that the bankrupt had not put into his schedule his interest in this land, and was now in possession, claiming his life estate by the curtesy, and in enjoyment of the rents and profits. The prayer of the petition is that the bankrupt be required to deliver possession to the assignee; that the interest of the bankrupt be sold; for a receiver; and general relief.

The bankrupt moved to dismiss the petition because—

(1) The children of the deceased wife were not made parties, and this court cannot proceed against them by petition; (2) the court cannot entertain jurisdiction since the repeal of the act to establish a uniform system of bankruptcy; (3) a summary petition is not the proper remedy; (4) on the facts stated in the petition the assignee is not entitled to recover.

The petition in bankruptcy was filed August 29, 1878; the wife died September 18, 1878; and the adjudication and assignment by the register were on November 1, 1878. The Code of Tennessee enacts as follows:

"Sec. 2481. The interest of a husband in the real estate of his wife, acquired by her either before or after marriage by gift, devise, descent, or in any other mode, shall not be sold or disposed of by virtue of any judgment, decree, or execution against him; nor shall the husband and wife be ejected from or dispossessed of such real estate of the wife by virtue of any such judgment, sentence, or decree; nor shall the husband sell his wife's real estate during her life without her joining in the conveyance in the manner prescribed by law in which married women shall convey lands.

"Sec. 2482. This exemption of the husband's interest in his wife's lands from sale shall not extend beyond his wife's life." T. & S. Code, §§ 2481, 2482.

*W. M. Randolph, (Robt. M. Heath with him,) for motion.*  
*Metcalf & Walker, contra.*

HAMMOND, D. J. The proviso to the act repealing the bankruptcy laws makes ample provision for continuing the jurisdiction of the court over all cases pending at the time of the repeal; and there is no force in the objection that the court has no jurisdiction "since the repeal of the act to establish a uniform system of bankruptcy." Act June 7, 1878, c. 160, (20 St. 99;) *Re Richardson*, 2 Story, 571; *Re Ankrim*, 3 McL. 285; *Carr v. Hilton*, 1 Curt. 231; *Re King*, 3 FED. REP. 839; *Re Hyde*, 6 FED. REP. 587. That a petition like that filed in this cause is the proper remedy for the assignee, and not a plenary suit by bill or an action at law, seems well established by the authorities. *Re How*, 18 N. B. R. 565; *Re Ettinger*, Id. 222; *Re Ketchum*, 1 FED. REP. 840; *Re Nichols*, Id. 842; *Re Moscs*, Id. 845; *Re Campbell*, 17 N. B. R. 4; *Re Swearingin*, Id. 138; *Re Peltasohn*, 16 N. B. R. 265; S. C. 4 Dill. 107; *Re Benson*, 16 N. B. R. 377; *Re Betts*, 15 N. B. R. 537; *Re Boothroyd*, Id. 368; *Re Thompson*, 13 N. B. R. 300; *Re Wright*, 8 N. B. R. 430; *Re Speyer*, 6 N. B. R. 255; *Re Kempner*, Id. 521; *Re Pierce*, 7 Biss. 426; *Re Smith*, 2 Hughes, 307.

Whether the estate that the bankrupt had in the land of his wife at the date of the filing of his petition in bankruptcy passed to his assignee depends upon a proper construction of the Tennessee statute. T. & S. Code, §§ 2481, 2482. At common law he was, on that date, a tenant by the curtesy *initiate*, and about the character of that precise estate there has been much conflict in the books, and much confusion. I do not, from authorities consulted, find that it has been ever settled or agreed upon whether the husband, before or after issue born, is in possession of his estate by virtue of this tenancy, or that which he has by virtue of the marriage, considered irrespectively of the birth of issue, or the possibility of such birth. Often it is unimportant whether he is in by the one or the other, but in the conflicts that arise over marriage settlements, grants to the wife by deed or will, the statute of limitations, dissolutions of the coverture by divorce, and the effect of conveyances by the husband and the wife, one or both, the nature of this tenancy by the curtesy *initiate* has been freely discussed, but in some respects remains unsettled. Too much force is sometimes given to the death of the wife, and even to the birth of issue, when either is thought to *originate* this estate by the curtesy, and it is sometimes said, as it is argued in this case, that prior to the death of the wife it is a *possibility* only,—something like the *spes successionis* of the heir apparent or presumptive to an estate, that does not pass to a voluntary assignee, or to an involun-

tary assignee, by operation of law. This is not true of the estate at any period from the moment of marriage and seizin of the wife down to the consummation of the estate; if issue be born, by her death.

Whether, before seizin by the wife, a husband's possible curtesy in lands belonging to the wife would be assignable, in law or in equity, by treating the conveyance as a covenant to assign, or not, certainly, from the very moment of such seizin, he becomes a tenant by the curtesy, and that is undoubtedly the initial point at which this estate in the particular land vests in him, no matter whether it originates in the seizin or the marriage relation. And from that moment, although he may be in possession by virtue of the marital right, or *jure uxoris*, as it is sometimes called, he is also in possession by virtue of this estate by the curtesy, if the two be separable at all. Some of the authorities say he is in by both by a kind of *remitter*, and possibly they may in some sense be said to unite or merge into each other, though neither will destroy or absorb the other. But, whatever the distinctions may be in this regard, and however for all purposes this matter may be determined, for the purpose of giving effect to his conveyances, and for the purpose of being subjected to his debts, it is vested in him whenever the necessary seizin of the wife occurs. If he convey, or it be assigned by operation of law after seizin, even before issue born, the estate by the curtesy passes, and his assignee holds, as he held it, subject to be divested by the failure of issue occurring by the death of the wife without having given birth to a child born alive; or, whether issue be born or not, by the death of the husband terminating the estate in the life-time of the wife; and in some peculiar circumstances, perhaps, by other events. The mistake is often made of supposing that the survivorship of the wife *defeats* the tenancy by the curtesy. Her survival has no such effect. His death *terminates* his life estate necessarily, whether it occurs before or after that of the wife. But it does not follow that this defeasible and determinable character of the estate reduces it to a bare possibility, or makes it an estate called into being by the happening of a contingency—either that of the birth of issue or the death of the wife in the life-time of the husband. The husband has, at best, only a life estate, and of course his death ends it, whether it happens before or after the death of the wife; and what the books mean by saying that her death consummates this tenancy by the curtesy is that from that time on there is no marital relation furnishing him any other right to possession or ownership of her lands than that which he has derived through this curtesy of the law. The death of the wife neither originates nor

vests the estate, but only consummates or makes perfect that which had been before originated and vested. I shall not here critically examine the authorities consulted on the general character of this estate with a view of determining the exact scope of our statute, because, whatever may be that character, it is too well settled that it may be conveyed by the husband, may be sold under *ieri facias*, and passes to an assignee in bankruptcy, to require more than a citation of some of the cases on that point. *Gardner v. Hooper*, 3 Gray, 398; *Vreeland v. Vreeland*, 1 Green, N. J. Eq. 513; *Boykin v. Rain*, 28 Ala. 332; *Day v. Cochran*, 24 Miss. 261; *Schermerhorn v. Miller*, 2 Cow. 439; *Gibbins v. Eyden*, L. R. 7 Eq. 371; *Morgan v. Morgan*, 5 Madd. 408; *Follett v. Tyrer*, 14 Sim. 125; *Cooper v. Macdonald*, L. R. 7 Ch. Div. 288; 1 Bish. Mar. Wom. § 489; Hill. Bankruptcy, (2d Ed.) 112, § 14. And in *Kesner v. Trigg*, 98 U. S. 50, no question was made but that the assignee took the estate by the curtesy. The same principle is found in *Re Bright*, L. R. 13 Ch. Div. 413, where a fund of personal estate was settled on the mother for life, and after her death on the children of the marriage, and it was held that the assignee in bankruptcy of one of the children took his share, though the life tenant did not die for nearly ten years after the bankruptcy.

Has our statute changed this result? I think not. Standing alone, section 2481 of the Code would exempt the whole estate of the husband from liability for his debts, and, as a consequence, by operation of the bankruptcy act itself, (Rev. St. § 5045,) it would not pass to the assignee. But section 2482 of the Code operates to restrict the quantity of the husband's estate that is exempt to so much of it as is measured by *his wife's* life. He holds the estate for his own life, and it is exempt from execution *for the life of another*, and therefore not necessarily for his own life. He asks here too much—more than this statute in terms gives him—when he claims exemption for the *whole* estate by the curtesy coextensive with *his own* life. That the statute has not abridged his common-law estate by limiting it to the life of his wife is plain, because he claims it after her death, and during his own life, and this he can do only on the theory that the statute has not interfered with his common-law estate in this land in regard to its quantity. If the statute has preserved to him his tenancy by the curtesy it has preserved it to his creditors, because the statute only cuts them off during the life of the wife.

It has been said in the books that a tenancy by the curtesy stands somewhat as if the wife had made a lease of the land to her husband

for his life, the reversion being in her or her heirs. Now, out of this estate of the husband the statute carves a portion which it exempts from execution, and that portion does not pass to an assignee in bankruptcy; not because of any peculiarity in the estate itself as being unassignable, but because the bankruptcy laws have in terms declared that property so exempt shall not pass to the assignee. It cannot, then, I think, be successfully claimed that the portion which we may call a surplus remaining after the wife's death is also exempt.

The next argument to be considered is that the estate now enjoyed by the husband is subsequently acquired property coming to him on the death of his wife, happening since the petition in bankruptcy was filed. This, to my mind, involves a total misapprehension of the nature of the estate of tenancy by the curtesy, and can only be sustained on the theory that the statute has created a new kind of estate for the husband in his wife's lands, or, rather, two estates. One of these, which he enjoys during her life, and in the enjoyment of which he was when the petition in bankruptcy was filed, is claimed as exempt property; and, as to the other, that it was created for him, or was called into existence by the death of the wife happening since the bankruptcy. During his wife's life this latter estate, it is argued, was a mere possibility which did not pass. The case of *Jackson v. Middleton*, 52 Barb. 9, is very much relied on to sustain this position. It should be read in connection with *Moore v. Littell*, 40 Barb. 488; 3 Am. Law Reg. (N. S.) 144, where the same deed was construed. There was a deed to John Jackson for his life, and after his death to his heirs and their assigns. It was held that during the life of the life tenant the heirs had "an alienable contingent estate in remainder," and that this estate, under a New York statute which subjected "lands, tenements, or hereditaments" to execution, was not liable to that writ. But a tenancy by the curtesy, in my judgment, has no sort of analogy to such an estate as the one mentioned in that case. If, however, this be incorrect, it is a sufficient answer to say that our bankrupt statute is much broader, and vests in the assignee all the estate, real and personal, of the bankrupt. Rev. St. § 5044. *Krumbaar v. Burt*, 2 Wash. 406, is also relied on, where it was decided that, under the act of 1800, possibilities did not pass. But our later acts are more enlarged in their operation; and even under the old acts this case was not approved, but overruled. *Belcher v. Burnett*, 126 Mass. 230; *Comegys v. Vasse*, 1 Pet. 193, 218; *Vasse v. Comegys*, 4 Wash. 570; *Nash v. Nash*, 12 Allen, 345. Under the old English acts, which were "very darkly

penned," (*Re Marsh*, 1 Atk. 158,) when the creditors only took "all such interest in lands as the bankrupt may lawfully depart withall,"—*Comegys v. Vasse*, 1 Pet. (original edition,) 200,—it was at first determined that only such interests as were alienable at law passed to the assignee, but afterwards it was held that such as were assignable in equity also passed; and possibilities coupled with an interest came to be regarded as assignable. Our bankruptcy act was intended to relieve us of all this trouble by using the most comprehensive terms, and there can be no doubt that every character of property belonging to the bankrupt himself passes. Bare possibilities—such, for instance, as the hope that one has that his father or other relative will die intestate, leaving him an inheritance—do not pass; but I cannot see that the tenancy by the curtesy, either at common law or under this statute, is of that character.

It is also argued, in support of the position that this estate of the husband did not pass, that "the assignee in bankruptcy does not take the whole legal title as heirs and executors do, but only such estate as the bankrupt has a beneficial interest in;" and this is true. If he has not a beneficial interest in a tenancy by the curtesy *initiate*, it is difficult to see why he has not. He has not so great benefit under the statute as he had at common law, for there are restrictions on his powers of alienation and restrictions on the right of his creditors to subject his interest to their debts; but in neither respect has his interest been wholly demolished, and the assignee only claims by this petition that beneficial interest which the statute left to him. This above-quoted formula is often found in the authorities, but I do not find that it has ever been applied to save to the bankrupt any property that belonged to him, but only such as belonged to third persons and which was held by him under some kind of trust relation. In the earlier stages of bankruptcy legislation, when the statutes were not so elaborate as now, it was a principle resorted to and established by the courts to save to third persons their rights in property which the bankrupt held for them, and to prevent the devolution of such trusts on the assignee, who did not become a general administrator of the bankrupt's legal and equitable powers over all property, doing in his stead for others what the bankrupt was required to do, but was restrained in his title to the property of the bankrupt which creditors could apply to their debts. The assignee, for example, takes subject to a wife's right of dower, to her right of survivorship; subject to her right to an equitable

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settlement; subject to all defeasances and contingencies in her favor, or in favor of any third person, for that matter; subject to the liens of a mechanic, or a factor, or the like; subject to the right of rescission of a contract for fraud, in some instances; subject to the *estoppels* on the bankrupt, where they do not grow out of some fraud on creditors; and, generally, subject to all trusts, liens, and burdens existing at the time. In some cases the circumstances were such the assignee took nothing, and in some only the surplus after the burdens were satisfied. *Brown v. Heathcote*, 1 Atk. 160; *Scott v. Surman*, Willes, 400; *Mitford v. Mitford*, 9 Ves. 87; *Re Dow*, 6 N. B. R. 10; *Rogers v. Winsor*, Id. 246; *Re McKay*, 1 Low. 345; *Re Faxon*, Id. 404; *Re Griffiths*, Id. 431; *Goddard v. Weaver*, 1 Woods, 257; *Re Hester*, 5 N. B. R. 285; *Eberle v. Fisher*, 13 Pa. St. 526; *Eshelman v. Shuman*, Id. 561; *Keller v. Denmead*, 68 Pa. St. 449; *Ontario Bank v. Mumford*, 2 Barb. Ch. 596.

Here, again, our bankruptcy statutes have recognized and declared this principle, and provide that no trust estates shall pass, and that all liens and rights of third persons shall be preserved, so that the assignee either does not take at all, or else takes subject to the liens and burdens. Rev. St. 5053, 5075, 5044, and notes; Bump, Bankruptcy, (10th Ed.) Applying the principle here, the assignee took the tenancy by the curtesy initiate as it existed at the date of the petition in bankruptcy, subject to the right of the wife, if she survived her husband, to defeat his estate; or, more accurately, subject to the determination that would come by his death, and subject to her rights under this Tennessee statute to remain in possession during her life, jointly with her husband, and that they should, *during that time*, enjoy the estate without disturbance by his creditors or his assignees of any kind, whether in bankruptcy or any other, unless she, by her deed according to law, should consent to give up the land. And it is possible that, by joint deed of the husband and wife, the assignee's title might have been defeated, even after the bankruptcy, in the same way as is sometimes done where she has a power of appointment; but it is not necessary to decide that here, as no such conveyance was made, and it is well settled that where she has the power to defeat his estate by appointment or conveyance of any kind, her failure to exercise it preserves his rights. The statute operates as a settlement upon her to that extent, but no further. And it is to be observed that it does not, as some statutes do, create a separate estate in the wife, nor destroy his estate in his wife's lands,



either that he holds *jure uxoris*, or the larger estate of tenancy by the curtesy.

It is always a question of intention whether the legislature has, by such statutes as these, cut off the husband's marital rights entirely or only partially; and they are construed, just as wills, deeds, marriage settlements, and other conveyances are, to go no further in that direction than the language used, in terms or by necessary implication, requires. This construction I have given the statute is supported by every Tennessee case which has construed or mentioned it. *Johnson v. Sharp*, 4 Cold. 45; *Dodd v. Benthall*, 4 Heisk. 601; *Bottoms v. Corley*, 5 Heisk. 1; *Corley v. Corley*, 8 Bax. 7; *McCallum v. Petigrew*, 10 Heisk. 394; *Lucas v. Rickerich*, 1 Lea. 726; *Young v. Lea*, 3 Sneed, 249; *Coleman v. Satterfield*, 2 Head. 259; *Gillespie v. Worford*, 2 Cold. 632; *Aiken v. Suttle*, 4 Lea. 103.

It is also supported by the cases construing settlements on the wife by will or deed, where the benefits conferred, the language used, and the restrictions on alienation and the husband's marital rights are similar to those in this statute. *Brown v. Brown*, 6 Humph. 126; *Hamricq v. Laird*, 10 Yerg. 222; *Frazier v. Hightower*, 12 Heisk. 94; *Baker v. Heiskell*, 1 Cold. 641; *Appleton v. Rowley*, L. R. 8 Eq. 139; *Marshall v. Beall*, 6 How. 70; *Moore v. Webster*, L. R. 3 Eq. 267; *Bennet v. Davis*, 2 P. Wms. 316; *Eden, Bankruptcy*, 245; 25 Law Lib. 193.

It also finds a complete analogy in the construction of our homestead statutes, which confer a similar benefit on the husband, wife, and children, and yet it is held that creditors may subject the husband's interest, subject to this right of occupancy and possession by the family, which may last during the life of the husband and wife or the survivor, and until the youngest child reaches a certain age. *Moore v. Hervey*, 1 Leg. Rep. (Tenn.) 22; *Mash v. Russell*, 1 Lea. 543; *Lunsford v. Jarrett*, 2 Lea. 579; *Gilbert v. Cowan*, 3 Lea. 203; *Gray v. Baird*, 4 Lea. 212; *Jarman v. Jarman*, Id. 671, 676. In *Marsh v. Russell*, *supra*, it is said, "the vendee is clothed with the legal title in reversion expectant on the termination of the homestead estate," which quite as accurately describes the kind of estate the assignee took in this case.

The same ruling has been made in other states where the statutes give a qualified homestead exemption, while in those where the exemption is absolutely of the whole estate, the assignee takes nothing. *Rix v. Capitol Bank*, 2 Dill. 367; *Re Tertelling*, Id. 339; *Re Betts*, 15 N. B. R. 537; *Johnson v. May*, 16 N. B. R. 425; *Re Wat-*

son, 2 N. B. R. 570; *Re Poleman*, 5 Biss. 526; *McFarland v. Goodman*, 6 Biss. 111; *Re Hinkle*, 2 Sawy. 305; *Re Hunt*, 5 N. B. R. 493; *Re Vogler*, 8 N. B. R. 132; *Re Sinnett*, 4 Sawy. 250.

It also finds support in the cases construing statutes of this and other states for the benefit of married women or their families. *Cooper v. Maddox*, 2 Sneed, 135; *Lyon v. Knott*, 26 Miss. 548; *Rabb v. Griffin*, Id. 579; *Stewart v. Ross*, 54 Miss. 776; *Hatfield v. Sneden*, 54 N. Y. 280; *Re Winne*, 1 Lans. 508; S. C. 2 Lans. 21; *Thompson v. Green*, 4 Ohio St. 216, 232; *Plumb v. Sawyer*, 21 Conn. 351; *Silsby v. Bullock*, 10 Allen, 94; *Staples v. Brown*, 13 Allen. 64; *Walsh v. Young*, 110 Mass. 396, 399.

Upon consideration of these authorities it will be found to be a general principle that, whether the settlement is made by statute, deed, will, or contract, the husband's marital rights are not interfered with further than the terms of the settlement go, and that what remains to him can be subjected by his creditors as if the settlement had not been made; and it is as well settled as it is possible to be that the circumstance that the wife is to receive the rents or profits or to enjoy the estate during her life, or that the husband is forbidden to convey it except with her consent, or that she may alone or jointly with him convey it or defeat the husband's estate by appointment by will or otherwise, will not, nor will any of them combined, alter the construction so as to affect or defeat his marital rights, nor the estate of his assignee or purchaser, except strictly according to the terms of the settlement. If an estate remains to him after her death as the residuum of what he would have had but for the settlement, his creditors may subject it, and it passes by his deed subject to be defeated if she survives or dies without exercising her powers of alienation.

Finally, there is an unreported case in this court, in *Re Stack*, a bankrupt, (June, 1879,) in which the circuit judge, sitting for the district judge, who was incompetent, upon the same principle decided in favor of the assignee. The wife of the bankrupt, under a deed from him, held land to her "sole and separate use and benefit, free from the debts, liabilities, and control of her present or any future husband, with power to sell, by joint deed with her husband, for reinvestment on same trusts, and if she should die in the life-time of her husband then to revert to him in fee-simple." The estate of her husband was not mentioned in the schedules of the bankrupt, as in this case, he deeming it secure from the operation of the bankrupt law, and the wife died pending the proceedings in bankruptcy, as here, whereupon the assignee filed a petition, like that in this case,

and the court compelled the bankrupt to surrender the land to the assignee. Under this deed the wife had all the protection she would have had under this statute, and a larger estate than she would have had if she had inherited the land or held it by an ordinary conveyance. Besides, the land itself was, at the date of the petition in bankruptcy, under the protection of this statute, both as to the interest of the wife and that of the husband. And, as to his interest, the only difference I can see is that there he had a reversionary estate in fee-simple, contingent upon his surviving his wife, but liable to be defeated also by their joint deed, (leaving out the reinvestment clause,) while here the bankrupt had a life estate, subject to the same contingencies. It was ruled that this estate was vested at the time of the bankruptcy, and did not vest at the death of the wife, and was, therefore, not subsequently acquired property. Furthermore, the ruling must have been the same in that case if Stack had had no contingent reversionary interest under the deed, and it had appeared there was issue of the marriage, for he was, in that event, a tenant by curtesy, notwithstanding this was a separate estate, and would have held the land for his life, unless it may be the words "free from the debts, liabilities, or control of any *future husband*" should be construed to entirely cut off his (Stack's) curtesy. I do not see any difference in principle between that case and this, because if Stack had under that deed such an interest as passed to his assignee during the life of his wife, subject to her rights under the deed and this statute, I do not see why the bankrupt here did not have, by the common law regulating the tenancy by the curtesy, such an interest in his life estate as passed, subject to the rights of his wife and his own under the statute.

The objection, in this view of the case, that the children of the wife are not parties to this proceeding, is not tenable. The assignee only claims the life estate of the bankrupt, and in this the children have no interest.

Motion overruled.

## McCLOSKEY v. Du Bois.

*Circuit Court, S. D. New York. 1881.*

## 1. LETTERS PATENT—NEW EVIDENCE—MOTION TO REOPEN.

A case will not be reopened for the introduction of new evidence, unless the new evidence would vary the case, and probably lead to a different result.

*James A. Whitney*, for complainant.

*Peter Van Antwerp and Rodney Mason*, for defendant.

WHEELER, D. J. This cause has been heard since a decretal order for dismissing the bill of complaint, and before decree signed, upon a motion of the plaintiff to reopen the case for the introduction of new evidence as to the novelty and utility of the patented trap. It is plain that the motion should not be granted unless the new evidence would vary the case and probably lead to a different result.

The patent is simply for a die-drawn seamless soft-metal plumber's trap, made by forcing the metal through dies at varying velocities on opposite sides. It describes nothing to distinguish these traps from others except the mode of manufacture and longitudinal striations appearing upon them, which are merely the result of the manufacture, and have nothing to do with the quality or operation of the traps. The patent assumed that soft-metal traps were before known and in use, and, besides, that fact was a matter of common knowledge, of which the court took judicial notice. There was no evidence as to the quality and characteristics of the die-drawn traps as compared with the cast traps before most in use. The new evidence would tend to show that their walls have greater solidity and more perfect uniformity, and that they are more elastic, and that the quality of the metal is changed and improved by the process of drawing, and that they have largely superseded all others in use. All these differences are due to the process of manufacture, in forcing the metal through dies, all of which effects were before well known. They are the same as the differences between cast and drawn lead pipe, as was shown in *Leroy v. Tatham*, 14 How. 156. There the testimony was that the drawn lead pipe "was superior in quality and strength, capable of resisting much greater pressure, and more free from defects, than any pipe before made; that in all the modes of making lead pipe previously known and in use it could be made only in short pieces, but that by this improved mode it could be made of any required length, and also of any required size, and that the introduction of lead pipe made in the mode described had superseded the use

of that made by any of the modes before in use, and that it was also furnished at a less price."

Still the court said, through Mr. Justice McLean:

A patent for leaden pipes would not be good, as it would be for an effect, and would consequently prohibit all other persons from using the same article, however manufactured. Leaden pipes are the same, the metal being in no respect different. Any difference in form and strength must arise from the mode of manufacturing the pipes. The new property in the metal claimed to have been discovered by the patentees belongs to the process of manufacture, and not the thing made.

And in *Collar Co. v. Van Dusen*, 23 Wall. 530, Mr. Justice Clifford said:

Articles of manufacture may be new in the commercial sense when they are not in the sense of the patent law. New articles of commerce are not patentable as new manufactures unless it appears in the given case that the production of the new article involved the exercise of invention or discovery beyond what was necessary to construct the apparatus for its manufacture or production.

The plaintiff did not discover that soft metal could be wrought through dies; nor that the quality of wrought soft metal is generally superior to that which is merely cast, and does not pretend that he did; and his patent is not for any such discovery, nor for the application of it. He constructed a machine by which crooked pipe could be made of soft metal the same as straight pipe had before been made, and the crooked pipe could be cut off so as to constitute traps. His patent is for the traps made in that way—for the effect merely of that machine. He has not the discovery of any principle, even such as the minority of the court in *Le Roy v. Tatham* thought Tatham had to support his patent, in the working of soft metal.

This newly-offered evidence of the differences in quality between the drawn traps and cast traps shows merely the differences between drawn pipe and cast pipe or wrought lead and cast lead, and could not affect the decision of the case at all in the view taken of it by the court. If this construction of the patent and view of the case are wrong they can be corrected by appeal.

The motion must be denied.

## STILL &amp; BRO. v. READING and others.

(Circuit Court, W. D. Texas. August 26, 1881.)

1. LETTERS PATENT—LICENSORS—THEIR RIGHT TO MAINTAIN ACTIONS AGAINST INFRINGERS.

A patentee, who has sold the exclusive right to use his invention for a term of years short of the full life of the patent, can maintain an action for an infringement.

2. SAME—PLEADING.

The petition, however, is demurrable, unless it affirmatively appears that the alleged infringer is not using the invention under the authority of the licensee.

*Walton, Green & Hill, Hancock & West, and J. W. Robinson, for plaintiffs.*

*S. S. Boyd, for defendants.*

TURNER, D. J. The plaintiffs in their petition allege that on the eighteenth day of September, 1877, they obtained letters patent from the United States government for the exclusive right to use, make, and vend their new invention, and known as the "Still saddle-trees;" that on the fifteenth day of January, 1878, petitioners contracted with one J. S. Sullivan & Co., of Jefferson City, in the State of Missouri, and sold to the said J. S. Sullivan & Co. the exclusive right to use their said invention, except that the plaintiffs reserved the right to use their own invention in their two shops in Texas; that said contract with J. S. Sullivan & Co. was to continue in force for the term of five years; that the letters patent granted to them (the petitioners) was to secure, and did secure, to them the exclusive right to use and control their said invention for the term of 17 years. The petition alleges that these defendants have infringed their right secured to them by said letters patent by the use of their invention in the construction of saddle-trees, etc., since the first day of January, 1880, up to the time of filing their suit. The petition alleges that in the sale of the use of their invention to J. S. Sullivan & Co. it was agreed that said J. S. Sullivan & Co. should pay to the plaintiffs a certain sum of money for each saddle-tree made, used, etc.; that the defendants, by using plaintiffs' saddle-trees, and by sales of saddles, etc., have deprived them of their just rights as patentees, and have, in fact, infringed upon their patent, and thus deprived them of the royalty that they would be entitled to if they had secured their right to make said saddle-trees under a contract with J. S. Sullivan & Co. The petition alleges that defendants are not using their invention by their

authority, and not under authority or by virtue of said contract between petitioners and said J. S. Sullivan & Co. Plaintiffs claim to have been damaged by defendants in consequence.

This is a brief statement of the allegations in the petition down to the thirteenth paragraph. In this paragraph it is alleged that defendants agreed to make a partial compensation to plaintiffs and to cease the use of said trees; but at the very time such settlement was about to be made other persons hereinafter named, of large fortune, etc., acting together with a view of ignoring, obstructing, defeating, and intimidating plaintiffs from asserting their right, issued a circular, which circular is copied into the petition, which circular being received by the defendants, they declined to pay petitioners and continued the use of plaintiffs' invention, etc.

To this petition a demurrer is interposed. The first point raised is that these plaintiffs cannot, under the facts of the case, maintain a suit in their own name in any event because of the sale to J. S. Sullivan & Co. of the right to use for the period of five years, a little less than one-third of the time the benefits of the invention were secured to plaintiffs. I hold that plaintiffs have a beneficial interest in the right secured to them by their letters patent, which in a proper case they may protect in a court of justice. They certainly own the remaining interest after the lapse of five years, and if that interest is of value they have a right to see that it is not destroyed.

To illustrate, let us suppose that these defendants are in fact using plaintiffs' invention to their damage, and Sullivan & Co. refuse to take notice of the infringement; or suppose that Sullivan & Co., with a view of avoiding the payment of the royalty due to plaintiffs by them, have an understanding with defendants that they will not interfere with them, and they divide profits, and thus attempt to deprive the plaintiffs of the royalty justly due them,—I certainly think plaintiffs have such rights in their invention as that they could protect it. Plaintiffs have not sold their right to the patent as patentees; they have sold merely the exclusive right to use it for the space of five years, according to the petition of plaintiffs, and nothing more.

This point of the demurrer is, in that view of the case, not well taken. The argument of the case having taken this view of the question, I have thought it proper to notice it, and the same is overruled.

The material point, however, in the case is that taken and raised by the demurrer, which goes to the sufficiency of the petition to ena-

ble plaintiffs to recover under it, all its allegations for the purpose of this demurrer being admitted. The petition shows the sale to J. S. Sullivan & Co. to have been made January 15, 1878. The injuries complained of began January 1, 1880. After this sale to J. S. Sullivan & Co. any person to whom they should grant the right to use the Still tree would be protected thereby, and plaintiffs' remedy would be by suit against Sullivan & Co. for the royalty. It follows, therefore, as the plaintiffs show, that J. S. Sullivan & Co. have the right to use their invention and authorize other persons in the United States to use the same; that in order to make a *prima facie* case of liability against a person for using the Still patent it must affirmatively appear that such person is not using it under the authority or license of J. S. Sullivan & Co. Does the petition show this? The rule to be applied is that the pleadings will be construed most strongly against the pleader.

It is insisted by defendants that this is a necessary allegation, and I am of the same opinion; because, if these defendants are working under Sullivan & Co. and using Still's patent, then, of course, the only remedy plaintiffs can have is by suit against Sullivan & Co. for their royalty. If defendants are not working under Sullivan & Co. and are infringing plaintiff's patent, then plaintiffs would be entitled to their remedy against them; hence the necessity of the allegation that they are not authorized to use plaintiffs' invention by J. S. Sullivan & Co. It is alleged that they are not using it under authority or by virtue of the contract between plaintiffs and J. S. Sullivan & Co.; but that is not alleging that they are not using it under or by virtue of a contract made by defendants with J. S. Sullivan & Co. The demurrer, therefore, upon this point is sustained.

The thirteenth paragraph cannot be relied upon as connecting the J. S. Sullivan Saddle-tree Company with the J. S. Sullivan & Co. to whom plaintiffs sold, because it states that certain persons hereinafter mentioned. This is inferentially saying that they have not been mentioned before. But suppose it did, and the circular should be regarded as part of the petition, and that Sullivan & Co. were in fact the Sullivan Saddle-tree Company. What then follows? The most that could be said would be that the saddle-tree company were authorizing these defendants to use the Moody tree, and in that event, if the Moody tree is the one invented by plaintiffs, then J. S. Sullivan & Co. are responsible to plaintiffs for the royalty, and their remedy is against them and not against the defendants in this suit. If



the Moody tree is not the Still tree, then there is no infringement of plaintiffs' invention and they cannot complain.

The demurrer to their petition on this point is sustained, as also to the prayer. The demurrer to the prayer is also well taken.

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### HAMMERSCHLAG v. GARRETT and others.\*

(Circuit Court, E. D. Pennsylvania. July 1, 1881.)

#### 1. PATENT—UNIFORMITY OF DECISION—WEIGHT TO BE GIVEN TO PREVIOUS DECISION IN OTHER CIRCUIT.

A proper regard for uniformity of decision requires that where one circuit court has, after a full discussion of the evidence, sustained a patent, another circuit court should, unless plain mistake be shown, follow such decision in a suit upon the same patent in which the same evidence is relied on.

#### 2. SAME—IMPROVEMENT IN WAXING PAPER—INJUNCTION.

Reissued patent No. 8,460, for improvement in waxing paper, sustained, and injunction against infringement granted, on final hearing; following a decision in *Hammerschlag v. Scamoni*, 7 FED. REP. 584, rendered upon a motion for a preliminary injunction.

In Equity. Hearing on bill, answer and proofs.

Bill for injunction to restrain the infringement of reissued letters patent No. 8,460, for improvement in waxing paper. Defendants denied the novelty of the patent and also denied the infringement. It appeared by the proofs that, in a suit brought in the United States circuit court for the southern district of New York by the same complainant against different defendants, to restrain an infringement of the same patent, the court had, upon a motion for a preliminary injunction, delivered an opinion in which, after a full consideration of the merits, and of the evidence respecting the state of the art and prior invention relied on in this suit, the complainant's patent was sustained and the preliminary injunction granted. See report of case, *Hammerschlag v. Scamoni*, 7 FED. REP. 584.

*Frost & Coe* and *John K. Valentine*, for complainant.

*Collier & Bell*, for respondent.

BUTLER, D. J. The circuit court for the southern district of New York decided the plaintiff's patent to be valid in *Hammerschlag v. Scamoni*, and construed its several claims. The evidence respecting the state of the art, and prior invention, now relied upon by the

\*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

defendant, was before the court in that case. The conclusion then reached should, therefore, be followed, unless indeed plain mistake be shown. A proper regard for uniformity of decision requires this. If the defendant thinks he is injured, a review can be had in the supreme court, and the subject thus be put at rest. The confusion and mischief likely to result from conflicting decisions should be avoided. While there may be difficulty in distinguishing the plaintiff's process and machinery from that described in the British letters patent No. 55, granted to John Stenhouse, we do not feel ourselves justified in saying they cannot be distinguished, as they were in the case cited, and thus disregard the decision there made. As respects the question of infringement, the defendant's process and machinery are so similar in all respects, to that of the defendant in *Hammer-schlag v. Scamoni*, that what is there said on this subject, applies with equal force here.

A decree must therefore be entered for the plaintiff.

### McKESSON and another v. CARNICK.

(Circuit Court, S. D. New York. April 8, 1881.)

#### 1. LETTERS PATENT—PILL MACHINE—INFRINGEMENT.

Letters patent for an improvement in pill machines, granted January 3, 1871, to Pierre Cauhapé, are not anticipated by either the Newton, Goward, or Murdoch & Haynes patents, nor by the Cordey apparatus; but infringed as to claim 2, by the apparatus used by Carnick.

#### 2. FORMAL CHANGES.

The use of the same combination is none the less an infringement for some changes in form.

#### 3. SAME—CLAIM 2 CONSTRUED.

By "the moulds, A," in the second claim is meant any suitable holder of the pills, whether they are formed therein or elsewhere.

#### 4. CLAIM 2—VALIDITY.

The second claim is good though the mould will not form a pill; provided, it will act as a holder for pills.

#### 5. SAME—SAME—COMBINATION.

The comb-bar, needles, and pill-holders form a combination; they are not a mere aggregation of parts.

#### 6. SPECIFICATION—SURPLUSAGE.

The word "glycerine" used in the specification may be rejected as surplusage.

#### 7. SAME—CLAIMS.

Where the claims are clear and distinct they will govern, rather than an ambiguous specification.

*Frederic H. Betts*, for plaintiffs.

*James A. Whitney*, for defendant.

BLATCHFORD, C. J. This is brought on letters patent granted to Pierre Cauhapé, January 3, 1871, for an "improvement in pill machines." The specification states the invention to be an "improvement in the manufacture of pills." It says:

"This invention relates to improvements in the manufacture of pills, and it consists in the employment, either in a combination with a moulding device for shaping pills, or other holder for them, of a comb-bar with pins or needles, adapted for inserting a pin in each mould cavity for taking the pills and dipping them in the coating solution, and a clamp and stripper for taking them from the needles and redipping them, for filling and covering the cavities formed by the pins, all as hereinafter described. Figure 1 is a transverse section of the mould and the device for taking them therefrom. Figure 2 is a side view of the device for taking the pills from the mould and dipping them; also a sectional view of the bath, showing the manner of dipping them. Figure 3 is a perspective view of the clamp, stripper, and the device for taking them from the mould, showing the manner of stripping them. Figure 4 is a side elevation of the clamp; and figure 5 is a face view of the same. Similar letters of reference indicate corresponding parts.

"The pills are to be formed in a mould or flask, A, composed of two parts, either hinged together or not, each having a part of the cavities, of which there may be any convenient number, and from each cavity a groove extends to one side, so that where the two parts of the mould are closed together a pin may be thrust into the pill for removing and holding it; and in connection with this mould a comb-bar, B, is used, having as many pins or needles, C, as there are cavities projecting from it, the same distance apart as the cavities, for inserting into said cavities and taking the pills therefrom. The mould is then opened, the pills removed on the pins, and inserted in the bath of glycerine, or other substance with which they are to be coated. Then, for holding and redipping the pills to fill and cover the cavities left by the withdrawal of the pins, I use a clamp composed of the two bars, E, hinged together as shown in figure 3, and the elastic frictional strips, F, of India rubber or other like substance, the latter being placed on the faces of the said bars, which come together, when closed, over cavities, G, made considerably longer than the pills, and opening out through the front edges of said hinged bars, as clearly shown in figures 3 and 5, in which the pills are inserted by opening the clamp, presenting them thereto coincident with the cavities while on the pins, and drawing the latter back over the stripping-bar, H, placed in front of the clamp, and having the small grooves, I, in the upper surface, placed in front of the cavities, for guiding the pins of the comb-bar in placing the pills in the clamp. The pills are held by the soft, flexible, and elastic strips, F, so that the ends having the holes project, as shown in figure 4, and may be dipped to cover and fill the holes, and then be discharged by opening the clamps. In practice the moulds, comb-bar, clamp, and stripper may be made in any convenient length, and with any preferred number of holes best calculated to

effect a rapid operation, and any number of sets of apparatuses may be used, in case it may be required to retain the pills on the pins, or in the clamp, for drying the substance with which they are coated. The pills may be taken on the comb-bar while in any suitable holder, after having been formed in other moulds, and I propose to use it in this way if found advisable."

There are two claims, as follows:

"(1) The combination of the comb-bar, B, clamp, E, and strippers, H, substantially in the manner described and for the purpose specified; (2) the combination of the moulds, A, with the comb-bar, B, substantially as and for the purpose specified."

The only claim in question in this suit is the second claim. That claim relates to the combination of the comb-bar, carrying the needles, with the pill-holder, substantially as and for the purpose described. The pill-holder is to have a number of cavities, so as to secure rapid work. There are to be as many needles as there are cavities. The manner of the combination is to have a groove extending from each cavity when the two parts forming the holder are closed, so that the needle may pass through the groove into the pill, and the pill be retained on and removed with the needle when the two parts of the holder are separated, so that the pills on all the needles may be removed at once and be dipped, on the needles, all at once, into the coating solution. That is the purpose specified. The result of this rapid work is a greater number of pills created in a given time, and thus a reduction of cost.

It is objected that the specification states that the pills are to be formed in "a mould, A," and that the needle is to be thrust into the pill while the pill is in the mould in which it is formed, and that the defendant does not form his pills in his pill-holder; also that "the moulds, A, mentioned in the second claim, are limited to moulds in which the pills are formed, and cannot include as holders, receptacles in which the pills are not formed or made or moulded from the raw material. But this view is contrary to the tenor of the text of the specification, which states that the invention consists in combining the comb-bar carrying the needles with "a moulding device for shaping pills, or other holder for them," and that "the pills may be taken on the comb-bar while in any suitable holder, after having been formed in other moulds." That being so, the expression, "the moulds, A," in the second claim, must be held to mean any suitable holder of the pills, whether the pills are formed in it or in another mould. It is also objected that a pill cannot be moulded, with prac-

tical success, in the mould shown in the drawings of the patent, and that the specification is misleading in saying so. But no such defence is set up in the answer, nor does the answer allege any fraudulent or deceptive intention, nor is any such proved, nor is it shown that Cauhapé did not believe that he could mould pills in the mould; nor that he had not done so. Moreover, the second claim is good, even if the mould will not form the pill, provided it will act as a holder for the pill.

It is also objected that there is no combination between the comb-bar and needles and the pill-holders, but only an aggregation of parts. This is an erroneous view. The pill-holder holds the pill while the needle carried by the comb-bar is being thrust into the pill. The concert of action takes place when the needle enters the pill, and, although such concert of action continues only from the time the needle enters the pill until the pill is removed by the needle from the holder, yet the combination made by such concert of action continues as long as it needs to continue; and the concert of action could not exist at all, so as to impale the pill on the needle, if the pill were not carried by the holder and the needle were not carried by the comb-bar. So, when the needle enters the pill, there is a combination or concert of action between the comb-bar and needle and the holder carrying the pill.

It is also objected that the specification names glycerine as a substance to be used for coating, and that glycerine is not used as a coating and will not act as such. This is immaterial, and aside from the invention. No such defence is set up in the answer. The specification refers to any coating solution which will coat. The word "glycerine" may be rejected as surplusage. Neither one of the claims has any reference to any particular coating solution, nor has any specific coating solution any connection with the subject-matter of either of the claims.

It is also objected that the specification sets out with stating the invention to be a combination of the holder, the comb-bar, the clamp, and the stripper; and that in the claims there are two combinations: (1) the comb-bar, the clamp, and the stripper; and (2) the moulds and the comb-bar; and that there is no claim for a combination of all four elements. A combination of all four is an impossible combination. The holder never acts when the other three are acting. The clamp takes the place of "the moulds, A," when the stripper and the comb-bar are brought into action. The claims must

control, they being clear and distinct. Moreover, it is not a fair construction of the language of the statement of the invention, in the description, that it requires there should be a combination of the four elements. It speaks of the employment of a comb-bar and needles, in combination with a moulding device or other holder; and then it speaks of the employment of a clamp and stripper with the needles. The language might admit of a combination of the four, if such a combination could exist; but it equally admits of the two separate combinations which are claimed.

The mould shown in the drawings of the plaintiff's patent does, as a receptacle for or a holder of the pill, act perfectly, with its groove and the needle and the comb-bar, to produce the result specified in the patent, if the pill be suitable for the holder in size and shape, although the pill be made in another mould. The holder has certain characteristic features. It is made of two parts, fitted together, which enclose a series of cavities for pills, in which the pills are so held as to receive, all at the same time, the needles carried by the comb bar, and to be removed all together by the needles. A groove extends from each cavity through the body of the holder, and acts as a channel-way and a guide for the needle while it is being thrust into the pill. One part of the holder is removable from the other part in such a way that the removal of it lays bare all the pills in all the cavities and faces all the needles at once, so as to enable all the needles and all the pills to be carried away at the same time by the comb-bar. The comb-bar has as many needles as there are grooves or cavities or pills, and the needles are the same distance from each other as are the grooves. Thus the needle is accurately guided through and by the groove into the pill. The needle is sharp-pointed, and can enter and remove the pill without injuring it, and is so small that nearly all the surface of the pill can be coated while the pill is on the needle, and the needle can afterwards be removed from the pill without injuring it. The apparatus is shown to be a very valuable one in the business of supplying the market with gelatine-coated pills.

The structure used by the defendant, Exhibit No. 3, has a holder, provided with a large number of holes in its surface, to hold pills, the holes being shaped to conform to the shape of the pills and to support the pills properly for the action of the needles. There is also a frame carrying needles, which pass through and are guided by holes or grooves in and through another frame, the points of the needles projecting beyond the latter frame. There is one hole for each

needle. In use, the receptacles in the pill-holder are filled with pills. The points of the needles are at distances apart from each other corresponding with the distances between the pills, and are thrust into the pills until the face of the grooved frame comes against the face of the holder. The needle frame and the grooved frame are removed together, with the pills impaled on the needle points, and the pills are then dipped, in this condition, into the coating solution. There is the same combination as in the second claim of the plaintiff's patent, of comb-bar, needles, guiding groove, and pill receptacle. There is a merely formal change. The guiding groove, instead of being in the frame which contains the pill receptacles, is in a frame which is attached to the needle frame. But the grooves in the defendant's apparatus act to support the needles laterally against diverging forces, and thus to guide them and insure their penetrating the pills properly. It must be held that the defendant's apparatus infringes the second claim of the plaintiffs' patent. The guiding grooves in it, by allowing the frame in which they are made to be drawn towards the pills, while impaled, and after they are dipped, permit such frame to be used as a stripper, to free the pills from the needles; but this is an additional function added to the use of the Cauhapé invention. The defendant's apparatus has all the essential features of the combination covered by the second claim of the plaintiffs' patent, as before defined.

There is nothing in the provisional specification of Newton which shows the Cauhapé invention, or the apparatus of the defendant. There are no drawings with it. The description is ambiguous, and it is far from clear how the apparatus was made. It is not a machine for making pills, but one for making capsules. There is no idea in it of a plurality of pills all impaled, and freed together. There are no guiding grooves, and no sharp-pointed needles or pins.

As to the Goward patent, Cauhapé's application was filed before Goward's specification was sworn to.

As to the Murdoch and Haynes patent, the defendant has introduced no evidence to show its bearing. On the contrary, the plaintiffs' expert shows that what is described in it has no relevancy to either the plaintiffs' apparatus or the defendant's.

The Cordey apparatus amounts to no anticipation of either the plaintiffs' or the defendant's. No original apparatus is produced. The matter is one of recollection, after the lapse of many years. The

witnesses do not agree, and there is great doubt and obscurity. Whatever there was, there were no guiding grooves and no sharp needles; nothing adapted to pick up pills which were to be coated and then stripped so as to leave no material trace of the puncture. Even if Cauhapé knew of all that was there at the time, there was invention in what he patented.

The assignment from Cauhapé to the plaintiffs is satisfactorily proved as a valid assignment. The testimony of Wickham fully explains the interlineations.

All the views urged on the part of the defendant have been carefully considered, although only the material ones have been commented on. There must be a decree for the plaintiffs as to the second claim of the patent, in this suit, and also in the suit against Neynaber.

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### McCONNOCHIE and others v. KERR and another.

(District Court, S. D. New York. August 26, 1881.)

#### 1. ADMIRALTY—JURISDICTION—CO-SALVORS.

Courts of admiralty have jurisdiction of an action to compel distribution by one co-salvor, who has obtained the entire salvage compensation, among the other co-salvors entitled.

#### 2. SALVAGE AND TOWAGE SERVICES.

The steam-ship Colon, bound from Aspinwall to New York, became disabled in her machinery in the Bahamas. She had a full set of sails, but was "at the mercy of the winds," and a hurricane, which was not unusual in those waters, "would have put the ship in jeopardy." Being nearly becalmed, she employed the Pomona, bound for Jamaica, to tow her to the nearest anchorage, 57 miles distant, for repairs.

*Held*, that the service rendered was in the nature of salvage, and not a "mere towage service." *Seem* it is not within the proper discretion of a master to deviate from his voyage to render a mere towage service for the simple convenience of another vessel in expediting her passage, unattended by any circumstances of danger; and if such circumstances exist the service is salvage, for which officers and crew are entitled to share in the compensation.

#### 3. SALVAGE—ARBITRATION—AWARD—BINDING ON PARTIES ONLY.

The owner and captain of the Pomona, having filed a libel against the Colon, claiming salvage "in behalf of all entitled," the respective owners, after answer and before hearing, submitted to arbitration the question whether the service was salvage, and the amount of compensation. The arbitrator decided that the service was not salvage, and awarded \$3,000 to the owner of the Pomona as for a towage service, which amount was paid to him, and the suit discontinued. Thereupon the present libel was filed by three of the crew to compel distribution of that money among the co-salvors.

*Held*, that as the \$3,000 was awarded on the basis of a towage service only,



and not as salvage, and received by the owner as for towage, he was entitled to retain it to his own use. The officers and crew not having been parties to the former suit, nor to the award and the settlement under it, their rights and remedies against the Colon are in no way affected by it.

#### 4. ESTOPPEL.

*Seemle*, upon a libel filed "in behalf of all entitled," the libellant, so long as no others have become actual parties and no decree had, is not estopped from settling the suit for his own interest and retaining the proceeds, according to the practice in analogous suits in equity. 2 Sim. & Stu. 196, note. See *Stevens v. The Railroads*, 4 FED. REP. 97, and note, p. 110.

In Admiralty.

*Butler, Stillman & Hubbard*, for libellants.

*Hill, Wing & Shoudy*, for respondents.

BROWN, D. J. The libellants are three of the crew of the steam-ship Pomona, who filed this "libel and petition," in behalf of themselves and all others interested, to recover their share of \$3,025.75, alleged to have been received by the respondents Kerr and Mahlman, the former as owner of the Pomona and the latter as its captain, for salvage services rendered to the steam-ship Colon on July 14, 1880. The answer admits the receipt of the money, but alleges that the service rendered to the Colon was not a salvage, but a mere towage service, in which Kerr only, as owner of the Pomona, had any legal interest.

If the money in question was paid to and received by Kerr as salvage compensation, and for the entire service, as substantially alleged in the libel, I have no doubt of the jurisdiction of this court to compel contribution to the libellants in this action. The receipt of the whole compensation as salvage would necessarily import its receipt for the benefit of all other co-salvors interested in the same service; and the determination and apportionment of the several interests of co-salvors in the gross sum received by one of them would present questions peculiarly within the cognizance of a court of admiralty. Its jurisdiction in such cases has been frequently exercised in this country during the last half century. *The Centurion*, Ware, 477; *Roff v. Wass*, 2 Sawy. 538; *Waterbury v. Myrick*, 1 B. & H. 34. Numerous other instances of this kind are cited by Judge Lowell in the careful opinion given by him in the case of *Studley v. Baker*, 2 Low. 205, which renders further references here unnecessary.

The questions presented for decision are, whether the service rendered to the Colon was a salvage service, and, if so, whether the libellants have any claim for contribution from the moneys received

by the respondent Kerr on account of the service rendered. The facts relating to the nature of the service are as follows:

The Pomona was an iron steam-ship of 391 tons gross tonnage, valued at about \$60,000. She was upon a voyage from New York to Montego bay, Jamaica, with three passengers, a full cargo of assorted merchandise, (value not stated,) and a crew of 15 persons. The libellants are the first and third engineers and one of the seamen. At about 2 A. M. of July 14, 1880, when in the Bahamas, she noticed signals from the Colon, which was lying nearly in her course, and bore towards her. As she approached she was met by a small boat from the Colon, bearing a request from Capt. Griffen for an interview with the captain of the Pomona. Capt. Mahlman thereupon went aboard the Colon, and was informed by Capt. Griffen that the after crank-pin of the shaft of his engine had been broken; that he desired assistance in getting to an anchorage, and wished to be towed to Fortune Island, to repair his machinery. That was the nearest safe anchorage, 57 miles distant, nearly north, and directly back of the Pomona's course. Capt. Mahlman replied that his "boat was light and not calculated for towing, but that he would do the best he could." Capt. Griffen desired to agree upon a lump sum for the service, but this Capt. Mahlman declined, and it was agreed that the question of compensation should be left to the owners. A hawser was accordingly run out from the Colon and made fast to the Pomona by the crew of the latter. They got under way at about 4 A. M. and arrived at Fortune bay at about 3:15 P. M. of the same day, where the Pomona left the Colon in safe anchorage, and thence proceeded upon her voyage. The towage to Fortune bay was without difficulty, in a smooth sea, with a light, favorable wind for most of the way, and with the sails of both vessels set.

The Colon was an iron steam-ship of about 2,680 tons, one of the line of the United States Pacific Mail Steam-ship Company, plying between New York and Aspinwall. She was upon one of her regular trips from Aspinwall to New York, and was tight, staunch, and strong, and in good condition except the disabling of her machinery. Besides the breaking of the after crank-pin, the columns above the engine were broken, the forward crank-shaft bent, and the condenser and the low-pressure cylinder cracked. These damages were considerable. The low-pressure engine could not be repaired by any means at the command of the ship; but the high-pressure engine, with which she could proceed by steam, could have been repaired in about seven days, and was repaired in that time at Fortune island, when the Acapulco, of the same line, appeared and took her in tow to New York, without the use of this engine.

Capt. Griffen testified that the Colon, at the time of the accident to her machinery, was provided with a full set of sails; that she was then 31 miles S.  $\frac{1}{2}$  W. from Castle island light tower; that there was a slight current to the south-west; that the wind at the time was a light easterly trade, with periods of calm; and that as the wind then was he could have made, under sail, about a knot an hour. When asked if he could not have worked himself into some port, he replied: "We were at the mercy of the winds. If we had good winds

we could have gone anywhere. We could have reached anchor and sent parties for relief." He also testified that the gales incident to that region were "northers and hurricanes;" that "in a northerly gale the ship was in a good berth;" but that "a hurricane would have placed the ship in jeopardy." Before reaching Fortune island the wind had died down to perfect calm. While on their way thither two other vessels were sighted going to or from New York.

Upon these facts I must hold the service rendered to the Colon to have been not a mere towage service, but in the nature of salvage, within numerous decisions of this court in analogous cases, some of them of quite recent date. *The Steamer Leipsic*, 5 FED. REP. 108, 113; *Brooks v. The Adirondack*, 2 FED. REP. 387; S. C. 872; *Atlas Steam-ship Co. v. Steam-ship Colon*, 4 FED. REP. 469; *The Saragossa*, 1 Ben. 551; *The Emily B. Souder*, 15 Blatchf. 1851. See, also, *Mayo v. Clark*, 1 FED. REP. 735; *Corwin v. The Barge Chase*, 2 FED. REP. 268; *Ehrman v. The Swiftsure*, 4 FED. REP. 463; *The Athenian*, 3 FED. REP. 248; *The Reward*, 1 W. Rob. 174; *The Charlotte*, 3 W. Rob. 71.

A salvage service is a service which is voluntarily rendered to a vessel needing assistance, and is designed to relieve her from some distress or danger either present or to be reasonably apprehended. A towage service is one which is rendered for the mere purpose of expediting her voyage, without reference to any circumstances of danger. "Mere towage service," says Dr. Lushington, (*The Reward*, 1 W. Rob. 177,) "is confined to vessels that have received no injury or damage; and mere towage reward is payable in those cases only where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered any damages or accident." And in *The Princess Alice*, 3 W. Rob. 138, he says: "It is the employment of one vessel to expedite the voyage of another."

To constitute a salvage service it is "not necessary that the distress should be actual or immediate, or the danger imminent and absolute; it is sufficient if at the time the assistance is rendered the ship has encountered any damage or misfortune which might possibly expose her to destruction if the service were not rendered." *The Saragossa*, 1 Ben. 551, 553; *The Charlotte*, 3 W. Rob. 68, 71. So, if a vessel is "in a situation of actual apprehension, though not of actual danger." *The Raikes*, 1 Hagg. 247; *The Phantom*, L. R. 1 Adm. 58; *The Joseph C. Griggs*, 1 Ben. 81. And "the degree of danger," says Dr. Lushington, "is immaterial in considering the nature of the service." *The Westminster*, 1 W. Rob. 232.

But if the evidence shows that the vessel was free from all circumstances of danger, present or apprehended; that ordinary towage service, at ordinary rates, could have been shortly obtained, so that salvage compensation could not be presumed to have been intended; and that the towage was rendered for no other purpose than to expedite the completion of the voyage,—the service will be deemed to be a towage service only. *The Emily B. Souder*, 15 Blatchf. 550.

Had the Colon, in this instance, been in no apprehension of danger; had she been able, in the judgment of her master, to continue her voyage under sail without any reasonable fear of hazard beyond the ordinary perils of navigation, as in the case last cited,—no reason appears why he should not have continued on his voyage, instead of interrupting it and proceeding to Fortune island for repairs. Nor would the master of the Pomona, under these circumstances, have been justified in going back upon his course, involving a delay of nearly a day in his own voyage. That was a plain deviation, involving, presumably, a violation of the vessel's contracts with every one of its seamen, insurers, and freighters. By the maritime law the master has an implied discretionary authority to make such deviations in the interest of commerce and humanity, in order to save endangered life or property. *The Centurion*, Ware, 490; *The Hooper*, 3 Sumn. 542, 579. In the award of salvage compensation, account is taken of the increased obligations resulting from such deviations. But I have not been referred to any authority, nor do I find any, holding that it is within the lawful discretion of a master to make such a deviation from his own voyage as was made in this case, merely for the convenience of another vessel, or simply to expedite its progress, in the absence of all circumstances of danger. Ordinarily, deviations of that character would be plainly opposed to the interests of commerce, and deserve censure rather than reward. It is not to be presumed, therefore, that such a departure from the voyage of the Pomona was either asked for or assented to, except upon the ground that the Colon was in actual need of assistance, through circumstances of apprehended danger, and that some salvage compensation was expected to be paid. The Colon, at the time this assistance was rendered, was not, like the Emily B. Souder, in the same condition as to her motive power in which she was when she left her last port; nor did she seek merely to expedite her voyage, but to get to safe anchorage as speedily as possible for repairs. The nearest safe anchorage was 57 miles distant, and she was nearly

localmed at the time the help of the Pomona was procured. There was a breeze of but one knot an hour, with periods of calm; and it was quite uncertain how soon she would be able to reach any port or safe anchorage, unassisted. If he had met no vessel to assist him, the captain says he would have sought anchorage and sent out parties for relief; that the vessel was "at the mercy of the winds," and that a hurricane, which, with "northers," were the ordinary storms of those waters, "would have put the ship in jeopardy." Through the disabling of her machinery she was, therefore, no longer prepared to encounter the ordinary contingencies of navigation in the Bahamas, either in proceeding on her voyage or in seeking a place of safety. These were circumstances of danger, though not of immediate peril, which justified the Colon in asking help of the first vessel that appeared. They justified the captain of the Pomona, under his implied authority, to deviate for purposes of salvage, in departing from her own voyage to tow the Colon to a safe anchorage, and consequently entitled the Pomona and her crew to a moderate salvage compensation.

By the accident to the Colon she had become unseaworthy for navigation in those waters. If the interests of commerce, of freighters, and of insurers all "require that no unnecessary risks be taken by a vessel's continuance at sea in a disabled and unseaworthy condition, (*Padelford v. Bordman*, 4 Mass. 554,) the same interests demand that encouragements be given, by rewards to captain and crew, as in cases of strict salvage, to assist all vessels so situated, whenever desired, into port or to a safe anchorage, as truly as in cases of immediate and present peril. And, whatever sums are allowed for the entire service in such a case, it is obvious that all *extra* compensation, over and above an actual indemnity to the salving vessel for the increased cost, expense, risk, and liability incurred through her deviation to render such assistance, ought in justice to be shared between the ship and her company, upon the same principles on which salvage is distributed, and not awarded to the vessel alone; and all such service should be therefore held and treated as in the nature of salvage.

The question remains whether the libellants, being entitled to share in salvage compensation, have any claim upon the respondent Kerr for the moneys paid to him on account of the service rendered. The facts in relation to the payment of the money are the following:

On the twenty-seventh of July, 1880, shortly after the arrival of the Colon in New York, the respondents filed a libel against the Colon and her cargo, "in behalf of themselves and all others entitled," claiming salvage compensation, but not stating the amount claimed. The vessel and cargo were attached, and bonds in the sum of \$50,000 executed for her release. An answer was filed on September 7th by the Pacific Mail Steam-ship Company, as owner and claimant, which concluded by alleging that "the service rendered was only towage, and should not be ranked as salvage service of peculiar merit," and tendered \$1,000 as "a just compensation for the services rendered." Though the libel purported to be "in behalf of all others entitled," it did not state the names or the number of the officers or crew, or make any other reference to them, or pray for any relief in their behalf. No other persons were made co-libellants, and there were no other actual parties to that suit. It does not appear that any citation was published, nor that any of the officers or crew of the Pomona, except the captain, who was one of the libellants, had any knowledge of the suit or of the subsequent proceedings.

On October 2, 1880, Mr. Kerr, the owner of the Pomona, and Mr. Houston, agent of the steam-ship company, agreed upon a submission of the claim to arbitration. The submission was oral, and the award, made on the same day, was also oral. Mr. Dennis, the arbitrator, was called as a witness in this action. From his testimony it appears that at the hearing before him Mr. Houston and Capt. Griffen were present in behalf of the Colon, and Mr. Kerr and his agent, Mr. Wessels, of the Pomona; that Capt. Mahlman was not present, nor these libellants, nor any other member of the officers or crew of the Pomona; that the questions submitted to the arbitrators were—"First, whether it was a salvage service; second, as to compensation;" that the parties present "agreed to abide by his award, whatever it might be;" that Capt. Griffen made a statement of the condition of the vessel and her general exposure, and submitted his private log; that Mr. Kerr and Mr. Wessels made a statement of what they had received from Capt. Mahlman; and "whether it was a salvage case" was pretty thoroughly discussed. He says: "I made my award in these words: that I did not regard the services as anything more than in the nature of a towing service, and that I should consider \$3,000 would be a very liberal amount for compensation, and my decision was to award \$3,000 in full for the service; the owner of the Colon to pay the legal expenses that had been incurred by the Pomona." He also testified:

"I did not intend, in the \$3,000, to provide or include any compensation for any one other than the owner of the steam-ship Pomona. I did not consider the crew as entitled to any portion. *That question was not raised*, but it was considered in my mind. I regarded this exclusively as a towage service. *It was compensation awarded to the owner of the vessel for the service.* The gross freights usually earned by the Pomona, on a regular trip of 25 days, would be about \$4,000. In awarding \$3,000 I did not go on the basis of ordinary towage rates. I did not consider such services ordinary towage. I had regard to the position of the vessel, her capacity to make harbor herself, and the danger to which she might be exposed. In my judgment, compensation for the diversion of such a vessel from her regular business for such service cannot be measured by the daily earnings of her regular business."

The respective owners expressed themselves satisfied with this award, and

on October 4th the \$3,000, with \$25.75 for costs, were paid to the proctors of the libellants in the former action, and the following receipt therefor was given upon discontinuance of that action:

[Title of cause.] "Received from the Pacific Mail Steam-ship Company the sum of \$3,025.75, the amount agreed upon in settlement of the above-entitled action; the fees of the officers of the courts to be paid by the claimants.  
"New York, October 4, 1880. JAS. K. HILL.

"WING & SHOUDY, Proctors for libellants."

From these facts it appears unmistakably, by the very terms of the award,—(1) That the claim of salvage was disallowed, and that, by consequence, all claims of the crew upon the moneys awarded were excluded, and intended to be excluded; (2) that the award of \$3,000 was made to the sole use of Kerr, as owner of the vessel, and as compensation for a towage service only, and not for salvage; (3) that the allowance of \$3,000 was made upon the basis of this lower grade of service as towage, and not upon the more remunerative basis of salvage; (4) it also appears that the terms and intent of the award were made known to the parties to it, that they acquiesced in it, and that the moneys in question were paid to Kerr in execution of it.

A settlement thus made is binding upon the parties to it. Neither side, as against the other, can afterwards legally or equitably assert any claims at variance with its intent or legal effect. Though the service rendered might be subsequently adjudged to be a salvage service, in proceedings by other persons interested, Kerr could claim no benefit from any share in the compensation that would have been awarded to him as owner, though it might be much larger than that received in his settlement; nor could the owners of the *Colon* claim any protection or indemnity from Kerr against the claims of any other persons not bound by the award and settlement. Nor can the court vary the amount of compensation awarded; but, as it was made upon the basis of a towage service only, it must be presumed to have been much less than would have been awarded to Kerr upon the basis of a salvage compensation. *The Emily B. Souder*, 15 Blatchf. 185.

As this court cannot directly set aside or vary the terms of the award and settlement, so it cannot do so indirectly at the suit of others by compelling Kerr to share with them the money which was paid to him for his own separate interest as owner, unless others have a clear legal right in the fund, and no other legal remedy exists. For if they still have other adequate remedy against the *Colon* for their compensation, the right of Kerr to the full benefit of the settle-

ment made by him would require them first to resort to that means of payment before coming upon the fund designed for Kerr's own benefit. I cannot perceive any ground of legal right in the libellants to share in the money paid to Kerr. No part of it was paid to their use or for their benefit. The basis of the award was a towage service merely, in which they had no legal interest. Whatever elements of salvage there were, according to the judgment of this court, in the actual service rendered, must be deemed, under the express terms of the award, to have been excluded and disregarded. The statement in the award that the sum allowed was "in full for the entire service," is controlled by the other statement that only a towage service and not a salvage service was allowed for. The sum given was awarded in full for a towage service, and that only. It was not in full for a salvage service, for that claim was disallowed. And while Kerr is bound by the finding that the service was a towage service only, other parties not bound cannot charge him, contrary to the fact, with having received the money as full salvage compensation, when it was awarded to and received by him simply as towage, and for his own exclusive use.

The libellants, moreover, have an ample remedy against the Colon. Their rights are unimpaired by the award and settlement in the former suit. They are in no degree bound thereby. The rights of co-salvors are not joint but several. The captain and owner have no authority to receive payment in behalf of other co-salvors, much less to submit their claims to arbitration or compromise. *The Britain*, 1 W. Rob. 40; *The Sarah Jane*, 2 W. Rob. 110; 2 Pars. Ship. & Adm. book 2, c. 8, § 1. But in this case the libellants were not parties to the former suit, nor to the arbitration, award, or settlement; they had no notice of the proceedings, and were not legally represented; and, considering that "the question of their right was not raised," as the arbitrator testifies, it is scarcely credible that the owners of the Colon supposed that their settlement with Mr. Kerr was not at the risk of any future claims against the Colon for salvage by the officers and crew of the Pomona.

In the adjudged cases in which contribution to the crew has been required out of moneys paid to the owner, the decisions have been based upon the ground that it appeared unmistakably that the money was in payment of the whole service as salvage, and received in behalf of all interested. In *Roff v. Wass*, 2 Sawy. 538, the bill rendered and paid was, "The Astoria and owners, Dr., to salvage services, \$5,000."



Judge Sawyer, in affirming the decision below, says: "I am satisfied this claim covered the entire salvage services. \* \* \* Nothing indicates any intention to limit the claim to that part of the compensation due to the owners of the vessel as separate claimants." In *Studley v. Baker*, 2 Low. 205, it "appeared plainly" that \$1,540 of the bill paid to the owners was for salvage services; and, on payment, the owners gave a receipt for the "owners, masters, and crew." Judge Lowell says: "The compensation was such as to indicate beyond mistake that it was understood to be for salvage service, and perfectly plain that it was the interest of both parties to adjust the compensation for the whole salvage service." And in *The Centurion*, Ware, 477, the same substantial facts appeared.

In the present case it is equally plain that the opposite was intended by the award, and by the settlement and payment made in pursuance of it. Had the award been made in this case as the entire compensation for a salvage service, the libellants, upon the cases cited, would have been entitled to contribution. So, also, if a price had been originally fixed for the service, whatever its character might be, and the question submitted to the arbitrator had been merely whether it were a towage or a salvage service, and he had held it a towage service merely, upon which the whole sum stipulated had been paid to Kerr, I should have had no hesitation in adjudging contribution in such an action as this; for, in that case, the arbitrator's erroneous decision as to the legal character of the service rendered could not have had any influence in fixing the amount to be paid for the service. The owner, by his receipt of the whole stipulated price, would in that case have become possessed of the fund appropriated to its entire payment, and the libellants, not being bound by the award, could, at their option, have followed the fund as held by intendment of law in part for their benefit.

It is claimed by the libellants that, inasmuch as Kerr received this money in a suit brought by him "in behalf of all entitled" for a salvage compensation, he is estopped from denying that it was received by him as salvage, and for the benefit of all. I do not perceive how this proposition can be sustained. There is no such relation between a salving owner libellant and other co-salvors, not actual parties, as legally precludes the former from showing the terms of a settlement made by him on his own account, or from retaining the moneys intended to be paid to his own use. It could not be claimed that any such estoppel would apply to a decree of the court in such a suit

adjudging the owner's compensation alone, and not providing for the officers or crew; nor could it be claimed that the latter could in such a case demand contribution from the owner instead of proceeding upon their own libel. An award and settlement thereon of the owner's separate interest are equally effectual; and as no action or inaction of the libellants was induced by the former suit, and their remedies remain unimpaired, I do not perceive any ground for the claim of estoppel. The mere filing of a libel "in behalf of all entitled" does not increase the owner's legal authority, or of itself create any trust for other co-salvors, nor impose any additional obligations on the libellant in their behalf; it does not make others actual parties to the suit, nor prevent their filing supplementary libels of their own. If they desire, they may be allowed to come in on petition; but if they do not do so, and the court should, from any cause, have entered a decree for the separate interest of some and not of all the co-salvors, the others may still assert their separate remedies. *The Aletheia*, 13 Weekly Rep. 279. To avoid multiplicity of actions the better practice is for all co-salvors to join in one action, (*The Boston*, 1 Sumn. 328; *The Edward Howard*, Newby, 522;) and the court would doubtless withhold costs in all unnecessary proceedings. And in a libel by one co-salvor it usually, for its own convenience as well as for the convenience of others, enters a decree making provision for all. But this does not affect the several and independent legal rights of co-salvors among themselves, or their right to make separate settlements of their own interests after suit commenced, though nominally for the benefit of all others interested, so long as no others have become actual parties.

Such is the established rule in equity. In suits for the administration of assets it is not uncommon for several actions to be brought by different creditors, all for the same common object, and each for the benefit of all others interested. These may all proceed until a hearing in some one of them, when a decree will be made for the benefit of all. Until decree every such suit is entirely in the control of the actual parties to it, and may be settled at their own pleasure, without reference to others. *Ross v. Crary*, 1 Paige, 416; *Handford v. Storie*, 2 Sim. & S. 196; *Pemberton v. Topham*, 1 Beav. 316; *Paxton v. Douglas*, 8 Ves. 520; *Story*, Eq. Pl. §§ 98-103; *Good v. Blewitt*, 13 Ves. 397; 19 Ves. 336; *Hallett v. Hallett*, 2 Paige, 19.

In *Handford v. Storie*, 2 Sim. & S. 196, a claim for contribution was made upon the precise grounds urged in this case, and overruled

for the reasons above stated. And similarly in admiralty, until decree, or until other co-salvors have been brought in as actual parties, I cannot doubt that the same unrestrained liberty of separate settlement exists, though the libel is nominally in behalf of all interested, and that any such settlement, fairly made, must be upheld according to the intention of the parties to it, without any responsibility over for the moneys received in the settlement to others who were not parties to it, and were not bound by it, nor intended to be benefited by it.

The arbitrator in this case having excluded the claim to salvage, nothing remained to be compensated but the owner's individual claim for towage, and for this only the money was awarded and paid. Although the libel was filed for a larger compensation as salvage, in which others might share, the settlement was for the smaller and separate interest of the owner for towage. And it was none the less so by reason of the arbitrator's error, if it was error, as I have held, that no others had any claim to compensation for the service stated in the libel. This error, and the settlement based upon it, cannot, by presumption of law, have worked any injury to the owners of the *Colon*, because, upon the lower basis of compensation adopted by the arbitrator, the award to the owner is, by presumption of law, lower than his share would have been in an award of salvage compensation. If the award was, as now claimed, excessive in amount on the basis adopted, concerning which I express no opinion, that was one of the risks of the arbitration, and the court cannot correct it.

The money in question having, therefore, been paid for the owner's separate interest, and to his own exclusive use, and the amount paid having been adjusted upon that basis, I find no grounds for any legal or equitable claim upon it by the libellants, and the libel must, therefore, be dismissed, with costs.

## THE ROBERT GASKIN

(District Court, E. D. Michigan. January 31, 1881.)

## 1. ADMIRALTY—LACHES.

Where libellant suffered over six years to elapse before filing his libel, the vessel having been within the district several times, and it appearing, further, that she had been sold to a *bona fide* purchaser having no knowledge of the claim, it was held he could not recover, notwithstanding the fact that the libel was filed before the sale took place.

## 2. SAME—NOTICE.

The filing of a libel, and the issue of an attachment, without seizure of the vessel, is not constructive notice of the pendency of the suit.

## In Admiralty.

This was a libel for towing the barge Robert Gaskin from Bay City to Lake Erie, August 12, 1873; amount claimed, \$150; defence, stale claim. The testimony showed that the present owners bought the Gaskin, which was a foreign vessel, March 12, 1880, for a valuable consideration, and without notice of libellant's claim. At the time the services were rendered she was owned in Kingston, Ontario, and was generally engaged in the Canadian trade. In 1874 she made three trips to Sault St. Marie, remaining each time five or six days. Upon returning from one of these trips, she lay at Port Huron 12 hours, discharging cargo. In 1875 she was in Michigan four times, and upon one trip lay in Detroit river, opposite the city, for several hours. In 1876 she was again at Bay City, where libellants resided. They visited her here; made a demand upon the master for the payment of their bill. They were content, however, with promises, and made no efforts to collect by legal proceedings. The barge was in Michigan three times in 1877, and once in 1878, but this fact was not known to the libellants. In 1879 she was again in this neighborhood, and lay off Detroit for about 18 hours. The bill appears to have been sent to the marshal at this place, with instructions to collect, in the spring of 1877, but no libel was filed until October 17, 1879, when an attachment was issued and kept alive by renewals until June 23, 1880, when she was seized. This was three months after she had been sold, and eight months after the libel was filed and the first attachment issued.

*J. W. Finney* for libellant.

*Wm. A. Moore*, for claimant.

BROWN, D. J. In this case six years and three months elapsed from the time the service was rendered to the day the libel was filed. No excuse is shown for the delay. In *The Hercules*, 1 Brown, Adm. 559, I had occasion to hold that the libel should be filed during the current season of navigation, or as early the following season as it was probable the vessel could be seized. The testimony does not show such an absence from these waters as precluded the necessity

of diligence. I see no reason to doubt that, if an attachment had been promptly taken out in the spring of 1874, the vessel would have been seized before the close of navigation. In 1876 she visited Bay City, and libellant there demanded his bill. Then, certainly, if not before, it was his duty to act. It is true he might not have been able to seize her before leaving Bay City, but if he had forwarded his claim at once to Detroit, an attachment might have been issued, and the brig seized on her down trip.

It is insisted, however, that the fact that the libel was filed before the sale was made to the present owners is sufficient evidence of diligence. It is not perceived how the owners are placed in any better position by this fact than they would have been if the libel had been filed after the sale. The fact that the libel was filed five months before the sale, can only be material upon the theory that the filing of the libel and the issuing of the attachment were constructive notice of the pendency of the suit. There is no doubt that in cases affecting real property the commencement of a suit is constructive notice of the *pendente lite*. Wade, Law of Notice, c. 2, § 5; *County of Warren v. Marcy*, 97 U. S. 107.

It is doubtful, to say the least, whether the commencement of a suit to enforce a lien upon a vessel is such a suit as is within the contemplation of this rule. But, waiving this question, it is quite evident that the suit was not commenced at the time the sale was made in such a way as to bind *bona fide* purchasers of the property, without actual notice. For the purpose of ascertaining whether a suit is brought within the statutory limitation, the suit is generally held to be commenced from the date the process is issued and placed in the hands of an officer for service; but in other cases, where the question as to the validity of a purchase depends upon whether the property purchased is the subject of litigation at the time, the suit will not be regarded as pending until the service of original process, whether the same is personally served upon the defendant, or by any method prescribed by statute as a substitute for personal service. Wade, Law of Notice, § 348.

Now, as it is clear in this case that the process was not served upon the vessel until three months after the sale, the suit cannot be regarded as having been commenced until that time. The creditor of a vessel is bound, as against a *bona fide* purchaser, to use due diligence; and I know of nothing but the continued absence of the vessel from the reach of process which will excuse him. He has no

right to wait and speculate upon the chance of the vessel being sold. In this case it made no difference to the vendee whether the libel was filed before or after his purchase, so long as he had no actual notice of the claim.

In *The City of Tawas*, 8 Cent. Law J. 191, I had occasion to observe that claims are not pronounced stale upon the sole ground of estoppel. In this case the claim of a material-man accrued shortly before the mortgage was given, and it was insisted that although the libellant waited for a considerable time before filing his libel, the claim had not become stale as against the mortgagee, as it was not stale when the mortgage was given, and there having been no change in the relative situation of the parties up to the time of filing the libel, the mortgagee had not been injured by the delay. I felt obliged to hold, however, that the creditor was bound to use due diligence himself, and that the court could not enter into nice inquiries as to how far the subsequent purchaser had been damnified by his failure to proceed immediately.

If libellants had taken out their attachment in the spring of 1874, and kept it alive by repeated renewals, I would have enforced the claim even at this late date; but after being guilty of such inexcusable laches, he cannot be heard to say that he filed the libel before the sale was made.

## POPE and another v. FILLEY.

*(Circuit Court, E. D. Missouri. October 3, 1881.)*

## 1. CONTRACT OF SALE CONSTRUED—LEX LOCI CONTRACTUS—EVIDENCE, INADMISSIBILITY OF PAROL, TO ADD TO A WRITTEN CONTRACT—BURDEN OF PROOF—EXPERT TESTIMONY—MEASURE OF DAMAGES.

Where a contract of sale was entered into in St. Louis, whereby the vendors agreed to ship the vendee 500 tons of "No. 1 Shott's Scotch pig-iron \* \* \* from Glasgow, as soon as possible," and deliver it to him in bond at New Orleans, for \$26 per ton; and they shipped that amount of iron from Leith, and tendered it to the vendee, who refused to accept it, and the vendors thereupon had it sold by a broker for all it would bring, and sued the vendee for damages,—*held*,

(1) That the burden of proof was upon the vendors to show that they had fully complied with the terms of the contract on their part.

(2) That the fact that the iron was shipped from Leith instead of Glasgow was immaterial.

(3) That it was necessary for the vendors to show a compliance with the contract as to time of shipment, but that "shipment \* \* \* as soon as possible" meant as soon as possible by any ordinary mode of transportation.

(4) That parol evidence was inadmissible to show that, by the custom of merchants, shipment should be by sail, unless it is specified that it shall be by steam.

(5) That the term "No. 1 Shott's Scotch pig-iron," as used in said contract, should be understood as having the meaning usually given it by persons engaged in the iron trade in St. Louis.

(6) That evidence was inadmissible to show what, in the opinion of merchants and business men in Glasgow, the contract means.

(7) That the vendors could not recover unless they proved a tender of iron of the quality called for by the contract.

(8) That the only persons who were competent to testify as experts concerning the quality of the iron were those who had given the subject of manufacturing and testing iron special attention, and had experience in the art, and had examined the iron in question.

(9) That evidence of the manner in which "No. 1 Shott's Scotch pig-iron" is examined and marked at the foundry, was inadmissible for the purpose of showing the quality of the iron tendered.

(10) That in case the vendors showed a compliance on their part with the terms of the contract, and a refusal on the part of the vendee to accept the iron, the measure of damages would be the difference between the contract price, together with interest thereon from the date of the tender, and the price for which the iron was sold, less the ordinary and usual commission paid brokers for negotiating such sales.

McCARY, C. J., in ruling upon objections to portions of depositions offered in evidence by the plaintiffs, said:

I have considered the objections to certain portions of the depositions of witnesses sworn on behalf of plaintiffs, and my conclusions may be stated generally as follows:

1. As to shipment "from Glasgow." This is not a condition precedent. If in anywise material it would be an independent covenant, not going to the whole consideration, and for a breach of which an action for damages would lie. But, in my judgment, it is not material. The purpose for which defendant made the contract was to secure, as soon as possible, a given quantity of a given quality of iron.

Whether the vessel carrying it should depart from Glasgow or Leith was immaterial.

2. Shipment "as soon as possible" is a natural and important provision of the contract. It required shipment as soon as possible by any of the ordinary modes of transportation. Parol testimony is not admissible to vary the language so that it may read "as soon as possible *by sail*."

Proof of a custom of merchants to ship by sail, unless specifically directed to ship by steam, is not admissible, nor can the plaintiffs be permitted to show by parol what, in the opinion of merchants and business men in Glasgow, the contract means.

3. The quality of the iron cannot be shown by proof of a custom of the foundry as to examining and marking.

It must be shown by the testimony of competent judges who have examined it. To be competent to testify as an expert upon this subject a witness must show that he is skilled in the business of manufacturing iron.

A clerk or book-keeper, although he may have been long employed in an iron foundry, and may have seen the business conducted, is not competent to testify as an expert unless he shows by his testimony that he has given the subject of examining and testing iron special attention and study, and has had experience in that art.

If it appears that he relies upon the decision of others, or upon the marks on the iron, he is not an expert. Accordingly, the testimony of Lindsey, in so far as he gives his opinion as to the quality of the iron, or testifies as to the customary mode of determining the quality, is excluded.

In accordance with these conclusions I have passed upon the several objections to testimony, and have marked them "sustained" or "overruled."

McCARY, C. J., subsequently charged the jury as follows:

*Gentlemen of the jury:* The counsel, in order to bring this case to a conclusion to-day, have consented that it may be submitted to you without oral argument on the charge which the court shall give you.



Plaintiffs sue the defendant upon a written contract, and allege that the defendant has failed to comply with his obligations as expressed in that contract. The contract is very brief, and is in the following words:

"SALE MEMORANDUM.

"St. Louis, February 20, 1880.

"*Thomas J. Pope & Brother, New York:* Have sold for your account to Mr. O. B. Filley, in St. Louis, 500 tons No. 1 Shott's Scotch pig-iron, at \$26 per ton, cash, in bond at New Orleans; shipment from Glasgow as soon as possible; delivery and sale subject to ocean risks.

"Yours, truly,

MILLARD & COMBS."

This is the contract. The allegation of the plaintiffs here is that, in pursuance of that contract, they caused to be shipped the iron mentioned in that contract, of the quality described, and within the time required, which iron was, they allege, delivered in New Orleans in bond, in accordance with the agreement, and tendered to the defendants, who refused to take it.

There is no dispute about some of the questions which are involved in this case. The execution of this contract is admitted. The shipment of 500 tons of iron from Leith to New Orleans is admitted. The tender of this iron to the defendant is admitted, and his refusal to accept is admitted.

The principal controversy arises upon the question whether plaintiffs themselves have fully complied with the terms of their agreement, and that is the question for you to determine upon the facts in the case, in accordance with the law as the court will give it to you. I say to you, however, as preliminary to that, that if it appears from the proof, to your satisfaction, that plaintiffs did comply with the contract on their part, and that the defendant refused to take the iron after the plaintiffs had so complied, then it was the privilege and the right of the plaintiffs to sell the iron in the market for the best price it would bring, and to charge the defendant with the difference between what it brought in the market and the price which he was to pay for it.

I believe there is no dispute, either, as to the price the iron brought. It was sold, I think, according to the testimony, at \$15 per ton. The price named in this contract was \$26 per ton; so if you find that the plaintiffs did comply with their part of this agreement, in all its material provisions, and that, notwithstanding that compliance, defendant failed to accept the iron when it was tendered to him, your verdict would be for the plaintiffs, and the amount of your verdict

would be the difference between the price at which the iron was sold, to-wit, \$15 per ton, and the contract price, \$26 per ton; also, in addition to that, the reasonable expenses of the resale, which would be the ordinary and usual commission of the broker, not necessarily the sum that was agreed on between the broker and these plaintiffs, because that would not bind the defendant, but the ordinary and usual commission would be all that could be recovered.

*Mr. Hitchcock.* There is no dispute about that; I will say  $2\frac{1}{2}$  per cent.

*Judge McCrary.* Which would be, according to the testimony here,  $2\frac{1}{2}$  per cent. on the amount of the sale; so your inquiry here, gentlemen, must be simply into the question of whether these plaintiffs complied with the contract upon which this suit is brought.

One of the provisions of the contract is that the iron was to be shipped from Glasgow, and I instruct you, as a matter of law, that that is not a material provision of the contract so far as this controversy is concerned. The purpose of the contract was the sale, by the plaintiff to the defendant, of a certain quality of iron, to be delivered in a certain time, at a certain place, and the fact that it was shipped from Leith instead of Glasgow is not material to the rights of the parties in this case if the other provisions of the contract were all complied with; so that that provision of the contract need give you no trouble. It is agreed here, and not questioned, that the iron was shipped from Leith instead of Glasgow.

Another provision of the contract is that the iron should be shipped as soon as possible, and upon this there has been some controversy, and it will be for you to decide whether, under the evidence, the iron was shipped by the parties in Scotland, who acted on behalf of these plaintiffs, as soon as possible after the order was received.

The meaning of that clause of the contract is that these parties were to use all reasonable diligence to ship as soon as possible. The time in such a case is of course important, and it was especially important in this case, because the parties saw fit, in their contract, to say that the iron should be shipped as soon as possible; but, if it was shipped by the first conveyance that could be had, and due diligence was used, then that part of the contract has been complied with.

The main controversy is, as you have already seen in the course of the testimony, as to whether the iron which was shipped to New Orleans and tendered to the defendant was of the quality designated and described in the contract, to-wit, No. 1 Shott's Scotch pig-iron.

Those are the words, gentlemen, which are used in the trade, which are peculiar to the business of the iron merchant. They are not words the meaning of which persons would ordinarily understand. Men who have no knowledge of the business of an iron merchant, or of the manufacture and sale of iron, would not be able to determine the question of what is meant by No. 1 Shott's Scotch pig-iron. Hence it is that the court has allowed testimony to be offered to you as to the understanding of iron merchants upon this subject as to the meaning that attaches to these words when they are used in the trade by dealers in iron.

This contract, as you observe, was executed in St. Louis, and I charge you that it must be understood to have referred to the term here. It must be understood that the parties used these words with the meaning that they have among iron merchants in this city, and you have had a good deal of testimony from the witnesses on both sides as to what is meant by those words—as to what quality of iron is described by those terms. I do not propose to go into recapitulation of the testimony, such as has been given to you, but I say to you that it is for you to determine from this testimony what those words do mean, as they are understood by iron merchants in St. Louis, and when you have determined that question then you are to inquire and decide whether the iron which was tendered to the defendant came up to and filled the requirement of such description.

If you find that the iron which was tendered was not within this definition, No. 1 Shott's Scotch pig-iron, then it does not follow the contract, and the plaintiffs cannot recover. But, on the other hand, if you find from the evidence that the iron was of the description named in the contract, as understood by the merchants here, where the contract was made, then the plaintiff has fulfilled that part of the contract, and is entitled to recover, if you find that he has fulfilled the other portions of the contract.

You have before you, gentlemen, the testimony of a great number of experts on this subject. It would take a great deal of time, and be to no purpose, for me to enter into a discussion of the testimony itself. It is for you to take it all and consider it fairly and dispassionately, and determine from it whether the contract in this respect has been complied with or not. All that I need to say to you, as a matter of law, is that the burden is on the plaintiff to show that he has complied with the contract, not only with regard to the time of the shipment, but with respect to the quality of the iron which was shipped and tendered to the defendant.

The counsel have suggested some instructions, gentlemen, which I, probably, have anticipated in part, but I will refer to them. And first, on behalf of the plaintiff, I was asked to say to you as follows:

"The jury is instructed that the words, 'as soon as possible,' used in this contract, are to be here construed in the ordinary, reasonable sense in which such expressions are used in business. They are to be understood in the light of all the circumstances under which the contract was made, and with reference to the course of trade in shipping iron from Glasgow."

This clause did not make it obligatory upon the plaintiffs to do everything which was possible as a physical act, if such act lay beyond what shippers of iron might reasonably be expected to do.

So far as the obligation of this clause of the contract is concerned it is sufficient if the jury find that plaintiffs diligently made every reasonable effort, in the usual course of commerce, to effect the prompt shipment of the iron.

That, I think, is a correct statement of the rule, and substantially what I have already stated to you. Plaintiffs also request me to say to you as follows:

"The court instructs the jury that, under the contract sued upon, it was the right, if not the duty, of the plaintiffs to cause the iron designated therein to be shipped to New Orleans as soon after the contract was made as they could do so by exercising all proper and reasonable diligence and judgment.

"If the jury find that it was impossible for plaintiffs to obtain a vessel from Glasgow, and that it was practicable to obtain one from Leith, and that shipment from Leith was a more expeditious way of getting the iron to New Orleans than waiting for a vessel from Glasgow would have been, then plaintiffs were justified in shipping the iron from Leith instead of Glasgow."

That is given as requested.

The defendant's counsel requests the court to instruct as follows:

"The jury are instructed that the contract sued on was an entire contract for the entire quantity of 500 tons of pig-iron of the description and grade mentioned in the contract, and the defendant was not bound to receive any of said iron unless the entire quantity so contracted for did in fact answer to the description called for by the contract."

Of course, gentlemen, under this contract the defendant was not bound to accept any part of the 500 tons unless the whole was tendered him. I do not, myself, remember any testimony tending to show that a smaller part was tendered.

*Mr. Hitchcock.* No, there is no dispute as to that; it is not as to how much was tendered.

*Judge McCrary.* Very well, sir; I say that is a correct rule, at all events. I say, furthermore, at the request of defendants:

"It is incumbent upon the plaintiffs in this cause, before the jury can find that the plaintiffs did fulfil the conditions of said contract on their part, to prove to the satisfaction of the jury not only that a part of the 500 tons alleged to have been tendered to the defendant by them under this contract was of the description contracted for, but that the whole of said 500 tons was of that description. Under the contract sued on it was not incumbent upon the defendant to receive any less quantity than 500 tons of the description contracted for, and it is incumbent on the plaintiffs, before they can recover for any part of the iron claimed to have been tendered by them to defendant, to prove that the whole of said quantity so tendered by them was of the description contracted for."

I give you that instruction, gentlemen, with this qualification, of course: it is not necessary that they should prove that every individual pig was alike. It is necessary that they should show that the lot, as a lot, came up to the description given in the contract.

It is a question of fact for the jury to determine upon the evidence before them, and under the instructions of the court, what description of iron the parties to the contract sued on meant by the term in the contract, viz., No. 1 Shott's Scotch pig-iron. The contract having been made in St. Louis, Missouri, any local or peculiar terms, or terms peculiar to the iron trade, which may be found in said contract, are to be understood as having whatever meaning was usually given to such terms by persons engaged in the iron trade in that city.

Evidence has been introduced tending to show what is the meaning of that phrase, according to the usages of that trade in this market, and it is for the jury to consider and find upon that evidence what was the meaning of those words, viz., "No. 1 Shott's Scotch pig-iron," as understood by persons engaged in the iron trade in St. Louis. If the jury shall believe from the evidence before them that, according to the usages of persons dealing in and using pig-iron in St. Louis, the words "No. 1 Shott's Scotch pig-iron" were understood by such persons to mean pig-iron made in Scotland, Shott's furnace, and of such grade as should correspond to the grade of Scotch pig-iron commonly described or recognized in this market as No. 1, then the jury cannot find that the plaintiffs fulfilled their part of the contract sued on, unless the jury shall be satisfied, from the whole evidence before them, that the 500 tons of iron which was offered by the plaintiffs to the defendant on or about the twenty-sixth of May, 1880, was iron made at Shott's furnace in Scotland, and did correspond, as to the grade thereof, with the grade of pig-iron usually known in this market as No. 1 when applied to Scotch pig-iron.

If the jury shall find from the evidence, according to the usage of

this market, the description of No. 1 Shott's Scotch pig-iron was understood by persons dealing in and using pig-iron as a description of iron such as is last mentioned, and that plaintiffs have failed to prove to the satisfaction of the jury that said 500 tons so offered to the defendant by them did, in fact, correspond with that description, then the jury should find for the defendant in this case.

That is, gentlemen, only to repeat in substance what I have said to you, that you are to determine from the evidence in this case what quality of iron was called for by that description as understood by iron merchants in St. Louis, where the contract was made, and then you are to inquire and determine whether that quality of iron was tendered to the defendant. If you should find for the plaintiffs, gentlemen, your verdict will be for the difference between the contract price of the iron and the price for which it was sold, less the costs of the sale, and interest at 6 per cent. from the date of the tender, as shown by the evidence.

If you find for the defendant the form of your verdict will be, "We, the jury, find for defendant."

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MORAN v. THE CITY OF ELIZABETH.

(Circuit Court, D. New Jersey. July 26, 1881.)

1. MUNICIPAL CORPORATION—JUDGMENTS—MANDAMUS.

The statute of a state provided, among other things, that when upon the recovery of a judgment against a municipal corporation and the levy of an execution thereunder sufficient property is not found to satisfy the same, a copy of such process shall be served on the collector and assessor, who shall then make an assessment and levy the required amount. *Held* that a writ of *mandamus*, commanding the city council to provide for the payment of the judgment, will not be granted in the absence of proof that the requirements of the statute have been complied with.

*Mandamus.*

NIXON, D. J. The above-named plaintiff, having recovered two judgments against the city of Elizabeth,—one, on the first of April last, for \$4,334.86, and the other, on the seventh of April, for \$2,079.23, besides costs of suit,—duly issued executions on the said judgments and placed them in the hands of the marshal, who has returned the same, with the indorsement that there is no property of the defendant corporation within the state whereon to levy, sufficient to satisfy the said executions. He now applies to the court for the writ of alternative *mandamus*, commanding the city council of the

city to meet forthwith and adopt measures for levying and collecting a tax for the amounts respectively due upon the judgments, with interest and costs, or to show cause at the next term of the court why the same has not been done.

The counsel for the city resists the application on the ground that, under the act of the legislature of the state of New Jersey, approved March 27, 1878, entitled "A supplement to an act entitled 'An act respecting executions,'" the city council had no concern in levying and assessing taxes for the payment of judgments and executions against the city; but that the plaintiff must pursue the course marked out by the above-quoted statute.

It appears by the pleadings in the two causes that the judgments were obtained on interest coupons which had matured, and which had been attached to certain bonds of the city of Elizabeth, issued on the first of April, 1875. The plaintiff became the owner of the bonds for value before March 1, 1879, and is entitled to the same remedies for the collection of the principal as existed at the date of purchase. See Const. of N. J. § 7, art. 3.

The act of March 27, 1878, provides—

"That when any execution shall be issued against \* \* \* a municipal corporation of this state, by any court authorized to issue the same, upon any judgment against \* \* \* such municipal corporation, whether upon a judgment recovered before the passage of this act or subsequent thereto, and there shall be no property belonging to such \* \* \* municipal corporation sufficient to satisfy the same whereon to levy, then the officer authorized to execute such process shall serve a copy of the same, not only on the collector of \* \* \* such municipal corporation, as is now required by law, but also upon the assessor thereof, who is by law required to assess the taxes in and for such \* \* \* municipal corporation; and upon the receipt of such copy of execution, it shall be the duty of such assessor to assess and levy, in addition to the regular taxes, the amount due upon the said execution, with interest to the time when the same shall be paid to the officer serving such process, upon all the property within such \* \* \* municipal corporation; and this tax shall be assessed and collected at the same time and in the same manner, and under the same conditions, restrictions, and regulations, as taxes for other purposes are required to be assessed and collected in such \* \* \* municipal corporation, and when collected shall be paid over to the officer serving the said process."

The act is broad enough, in its terms, to apply to the courts of the United States in the district of New Jersey, and I have no doubt that suitors in these courts are entitled to the benefit of its provisions. These pending cases are proceedings at law, and sections 914-916 of the Revised Statutes of the United States enact—

"That the practice, pleadings, and forms and modes of proceeding in civil causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time, in like causes, in the courts of record of the state within which such circuit and district courts are held; and that in common-law causes the plaintiff shall be entitled to similar remedies, by attachment or other process, or by execution or otherwise, against the property of the defendant, which are provided by the laws of the state in which such courts are held for the courts thereof."

Whether the said act is a cumulative remedy or not, it is certainly a simple and efficacious one for all persons having unsatisfied executions against towns, townships, boroughs, or other municipal corporations.

When the plaintiff shall file proof that he has caused the marshal to serve copies of the said executions upon the assessors and collectors of the defendant corporation, or upon the municipal officers whose duty it is to assess and collect its ordinary taxes, he will be in the position to petition the court for a *mandamus* commanding the assessors to assess and levy, in addition to the regular taxes, the amounts due upon the said executions respectively, with interest to the time when the same shall be paid to the marshal, or to show cause before the court, at the opening of the next stated term, why they have not performed the said duty.

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UNITED STATES v. GILLESPIE and another, Ex'r's, etc.

(Circuit Court, D. New Jersey. November 1, 1881.)

1. EQUITY—JURISDICTION—TRUSTS UNDER A WILL.

A court of equity has jurisdiction over a bill by a *cestui que trust*, to have the will construed; the directions of the court to the trustees and executors in regard to the proper method of executing the trust; and, as auxiliary to this, to have an account rendered to enable it to ascertain what is the residue of the estate available for the purposes of the trust.

A. Q. Keasbey, Dist. Atty., and Edwards Pierrepont, for complainant.

R. Gilchrist and Cortlandt Parker, for defendants.

Before McKENNAN, C. J., and NIXON, D. J.

NIXON, D. J. The bill of complaint is filed in this cause against the executors of Joseph L. Lewis, late of Hoboken, in the county of Hudson and state of New Jersey, deceased, and it alleges that the said Lewis departed this life on or about the fourth day of March, 1877,



having first duly made and executed his last will and testament, bearing date October 1, 1873, and a codicil thereto, dated June 5, 1875, by which will and codicil, after certain specific bequests, he devised and bequeathed all the residue of his estate as follows:

"I give, devise, and bequeath all the rest, residue, and remainder of my estate, real and personal, and of every kind whatsoever, of which I may die seized and possessed, and to which I may be at my death entitled, unto my executors, in trust, to expend and apply in reducing the national debt of the United States of America, contracted in the course of the rebellion of 1861. In the execution of this trust my executors, as trustees, may use their discretion as to the manner of applying the said residue and remainder of my estate to the reduction of the said debt; but I strictly enjoin them that they personally superintend the application of the said residue and remainder to the purpose aforesaid, that there may be as little waste of it as possible, and that it may not be diverted to other uses by dishonest officials."

It further alleges—

That the executors propounded the will for probate in the prerogative court of New Jersey about the fifteenth of May, 1877; that the same was admitted to probate, and letters testamentary granted thereon to the said executors on the twenty-ninth of May, 1878; and that they thereupon took on themselves the administration of the estate, and have thereby obtained the possession of and now hold United States bonds and securities, and other property of great value, belonging to the said Lewis at the time of his death.

The bill states various other matters, to which it is not deemed necessary to refer in this connection; and, after alleging that the will has created a trust in favor of the United States which the defendants are legally bound to execute, and that the United States has full right and power to enforce its performance in this court, it prays—

That an account of the estate of the testator, and of the receipts and disbursements of the executors, shall be taken and audited, and that the debts, legacies, and expenses remaining unpaid shall be duly paid, under the direction of the court, in due course of administration; that the amount of the net residue, applicable to the reduction of the national debt, shall be ascertained and settled; and that the executors shall bring the funds in their hands into the court to abide the administration thereof, and the decree to be rendered therein; and that it may be adjudged and decreed that the said bequest in favor of the United States is valid and operative; and that the defendants be decreed to execute the trust in regard to the residue of the estate; and that the defendants shall answer, state, and set forth how they propose to perform and fulfil the trust, after the residue of the estate has been ascertained; and that, if such proposal be satisfactory to the court, the defendants shall be authorized and directed, by the decree of the court, to execute the said trust in the manner so proposed; and that the complainant may have such other and further relief in the premises as the nature of the case may require.

To the bill the defendants have interposed six pleas, supporting the same by an answer. They substantially allege;

(1) That the complainant has made no reasonable demand for the legacy or relief prayed for.

(2) That no suit can be maintained against an executor, in a court of equity, for a legacy, or other such relief as is prayed by the bill, on such allegations as are made in the bill, until a reasonable demand has been made for such legacy or relief, and that no reasonable demand has been made.

(3) That by the statute law of New Jersey no suit at law can be maintained for a legacy or bequest until after reasonable demand made upon the executor who ought to pay the same; and that no such demand has been made for any part of the relief prayed for, or for any action on the part of the executors, in relation to the discharge of their duties under the will.

(4) That no persons interested in the estate of a testator as legatee or *cestui que trust* can lawfully cite executors to account, alleging only the facts alleged in the bill of complaint, until after a year from the probate; and in case of a suspension of their authority by an appeal from the probate until one year after the affirmance of the probate; that in the present case the probate was granted May 29, 1880; that it was appealed from by John S. Cathcart and others on the first of June, 1880, and was affirmed by the court of errors and appeals, March 1, 1881; that said appeal suspended all rights and powers of the executors, except such rights and powers as they had before the probate; and that they were unable to sue, or be sued for or in respect of any matter stated in the bill, until they had an unsuspended authority for one year after probate, and that when the bill was filed, to-wit, June 7, 1881, they had had an unsuspended authority for only 102 days.

(5) That by the laws of New Jersey an order may be made by the ordinary, or other authority granting probate, that the executors of an estate give notice to creditors of the decedent to bring in their demands against the estate within nine months, on the expiration of which time the court may decree that all creditors who have not brought in their claims shall be barred; that such order was taken in this case, March 12, 1881, which was the earliest time that an effectual and undoubted order could be obtained in consequence of the suspension of their authority by the appeal; that until the date of the expiration of said order, to-wit, December 12, 1881, it cannot appear that there is any residue of the estate after paying creditors; that many persons have made claim to all, or a large portion, of the testator's assets, under deeds of trust and secret trusts created by testator before his death, not disclosed; and that these claimants to the *corpus* of the estate should be barred before any decree against the executors.

(6) That by statute no action can be brought, either at law or in equity, against executors within six months after probate granted, unless upon suggestion of fraud; and that six months has not elapsed from and after probate was granted to them of said will, within the meaning of said statute.

These pleas have been set down for argument under the thirty-third equity rule, and the respective parties have been fully heard. After

a careful consideration we are of the opinion that they must be overruled. They seem to have been founded upon a mistaken apprehension of the nature, character, and object of the bill of complaint. It is not a suit for a legacy or bequest, and hence the several statutes quoted, and the reasons for a stay of proceedings against executors in suits of that sort, have no application. The theory of the bill is that there is an estate in the course of administration in one of the courts of the state of New Jersey which the complainant desires to have administered here; that the defendants are the executors and trustees of the estate, and have the trust fund in their hands, to be disposed of according to the provisions of the will; that the complainant, as *cestui que trust*, is entitled to have the will construed by this court, and to have the directions of the court, to the executors and trustees, in regard to the proper method of executing the trust; and, as auxiliary to this, may require an account in order to ascertain what is the residue of the estate available for the purposes of the trust. The general jurisdiction of courts of chancery over questions of this kind, in the administration of estates, is undoubted, and such jurisdiction must be exercised by this court, sitting in equity, when the proper parties appear to invoke it. Entertaining this view it is not necessary to follow the counsel in their learned discussion of questions which are not involved in the subject-matter of the bill of complaint. But, perhaps, we ought to advert to the apprehensions expressed on the argument that the mere allowance of the suit might be construed into a reflection upon the conduct of the defendants. We do not so regard it. We find nothing in the bill suggesting unfaithfulness on their part, and look upon the proceeding as a request by the complainant that the court should aid the trustees in the discharge of their delicate and responsible duties, and should require only the exercise of such reasonable diligence as the condition of the estate and the circumstances of the case demand. With what speed they should be ordered to proceed is under the control of the court, to be determined on the answer, and not on the pleas; and it ought not to be assumed in advance that the court will make any order which will unreasonably subject the defendants to either hazard, loss, or practical inconvenience.

The pleas should be overruled, and it is ordered accordingly.

UNITED STATES *v.* BIXBY.\*

(District Court, D. Indiana. November 3, 1881.)

## 1. MINORS—NOTARY PUBLIC.

There is nothing in the constitution or statutes of the state of Indiana making minors ineligible to the office of notary: such office is not a county office within the meaning of the constitution, wherein it provides that none but electors shall hold county offices.

## 2. SAME—OFFICES.

At common law minors are eligible to offices which are ministerial in their character, and call for the exercise of skill and diligence only, and they are *not* eligible to offices which concern the administration of justice. The office of notary is purely ministerial.

Indictment for Perjury. Plea that the notary who administered the oath was a minor. Demurrer to the plea.

*Chas. L. Holstein*, U. S. Atty., and *Chas. H. McCarer*, Asst., for the United States.

*McDonald & Butler* and *Gordon, Lamb & Sheppard*, for defendant.

GRESHAM, D. J. The indictment charges that the defendant committed perjury in swearing to the truth of a quarterly report as assignee in bankruptcy, before Aretus W. Hatch, a notary public. The defendant pleads specially that at the time the alleged oath was administered to him by the said A. W. Hatch, as notary public, the latter was a citizen of Marion county, Indiana, and a minor, under 21 years of age. A demurrer to this plea presents the following questions, viz.:

(1) Are minors ineligible to the office of notary public under the constitution or statutes of the state of Indiana? (2) If not, are they ineligible at common law?

Article 6, § 2, of the constitution, declares that there shall be elected in each county, by the voters thereof, a clerk of the circuit court, auditor, recorder, treasurer, sheriff, coroner, and surveyor.

Section 3 declares that such other county and township officers as may be necessary shall be elected or appointed in such manner as may be prescribed by law. Section 4 declares that no person shall be elected or appointed as a county officer who shall not be an elector of the county. Article 2, § 2, declares that only males, 21 years of age, are electors.

The first section of the act providing for the appointment of notaries public, and defining their powers and duties, (1 Ind. Rev. St. 634,) provides that such officers shall be appointed and commissioned by

\*Reported by Chas. L. Holstein, United States Attorney.

the governor, upon a certificate of qualifications and moral character from the judge of the circuit or common pleas court of their counties, respectively, and shall, before they enter upon their duties as such, take an oath of office before the clerk of the circuit court of their counties, respectively, and file in his office, to be approved of by said clerk, an official bond. Section 5 of the same act confers power upon notaries to take and certify acknowledgments of deeds and other instruments of writing, to administer oaths generally, to take and certify depositions, and to do such acts as, by common law and the customs of merchants, they are authorized to do. Section 7 provides that no person holding a lucrative office, or being an officer in any bank or corporation possessed of any banking powers, shall be a notary public. Section 4 of a later act (1 Ind. Rev. St. 635) declares that the jurisdiction of a notary public shall be coextensive with the limits of states, but no notary shall be compelled to act beyond the limits of the county in which he resides.

The authority of notaries extends throughout the state, and they are not required by statute to be 21 years of age. But it is urged by counsel for defendant that under the constitution none but voters 21 years of age are electors; that no person not an elector can hold a county office; and that notaries are county officers. Notaries have nothing to do with the affairs of the county, and they discharge no duties as county officers. In taking and certifying acknowledgments of deeds and other written instruments, administering oaths, and in doing such acts as by common law and the customs of merchants they are authorized to do, they do not act as county officers. They are not needed in the administration of county affairs, and they are not county officers within the meaning of the constitution. There is nothing in the constitution or statutes of Indiana making infants ineligible to the office of notary public. Unlike most of the states, Indiana has not declared, in her constitution or statutes, that only those who have attained the age of 21 years shall be eligible to any public or civil office.

While at common law persons are not admitted to full enjoyment of civil and political rights until they have attained the age of 21 years, yet infants are capable of executing mere powers, and, as agents, of making binding contracts for others. In England they are allowed to hold the offices of park-keepers, foresters, jailer, and mayor of a town; and in both England and this country they are capable of holding and discharging the duties of such mere ministerial offices as call for the exercise of skill and diligence only. They are not eligible

to offices which concern the administration of justice, on account of their inexperience, and want of judgment and learning. *King v. Diliston*, 2 Mod. 222; Tyler, Infancy & Cov. § 78.

Stevens T. Mason was appointed secretary of the territory of Michigan by President Jackson in 1831, when he was but 19 years of age, and while yet an infant he became acting governor, and the vigor and wisdom which he displayed in these offices vindicated the propriety of his appointment. Other instances might be cited in which infants have discharged the duties of purely ministerial offices which did not concern the administration of justice. It need hardly be said that the office of notary public is ministerial, and that it does not concern the administration of justice.

Demurrer sustained.

### UNITED STATES *v.* CAHILL.

(*Circuit Court, E. D. Missouri.* November 2, 1881.)

#### 1 PREVENTING CITIZEN FROM VOTING—INDICTMENT UNDER SECTION 5511, REV. ST.—NECESSARY AVERMENTS.

An indictment designed to charge an offence under section 5511 of the Revised Statutes of the United States, for unlawfully preventing a qualified voter from exercising the right of suffrage, should charge the offender with interfering "at a congressional election" with a voter qualified to vote, and offering to vote, for a representative in congress.

#### 2. SAME—SAME.

Such an indictment need not set out the facts on which depend the right of the person interfered with to vote.

#### Demurrer to Indictment.

The indictment is as follows, viz.:

"United States of America, Eastern District of Missouri—*ss.* In the District Court of the United States in and for the Eastern District of Missouri, at the November Term thereof, A. D. 1880.

"The grand jurors of the United States of America, duly empanelled, sworn, and charged to inquire in and for the eastern district of Missouri, on their oaths, present that heretofore, to-wit, on the second day of November, in the year of our Lord one thousand eight hundred and eighty, at the third congressional district of the state of Missouri, a lawful election was held, at which said election a representative for said congressional district, in the forty-seventh congress of the United States, was voted for. That one Alexander Batton, being then and there a duly-qualified voter of said state, in said congressional district, and in election district number thirty-nine of the fourth ward of the city of St. Louis, in said congressional district, and then and there entitled to vote at said election district, was then and there proceeding to offer to vote and to deposit his ballot at the polling place in said election district at said election. That Patrick Cahill, late of said eastern district of Missouri, did then and there, while the said Alexander Batton was proceeding to

offer to vote and to deposit his ballot at said polling place as aforesaid, by threat and intimidation, unlawfully prevent the said Alexander Batton, a qualified voter, as aforesaid, from then and there fully exercising the right of suffrage, contrary to the form of the statute of the United States in such case made and provided, and against their peace and dignity.

(2) And the grand jurors aforesaid, on their oaths aforesaid, do further present that heretofore, to-wit, on the second day of November, in the year of our Lord one thousand eight hundred and eighty, at the third congressional district of the state of Missouri, within the eastern district of Missouri, a lawful election was held, at which said election a representative for said congressional district in the forty-seventh congress of the United States was voted for. That one Alexander Batton, being then and there a duly-qualified voter of said state, in said congressional district, and in election district number thirty-nine of the fourth ward of the city of St. Louis, in said congressional district, and then and there entitled to vote at said election district, did then and there attempt to vote and to deposit his ballot at the polling place in said election district. That Patrick Cahill, late of said district, did then and there, while the said Alexander Batton was attempting to vote and to deposit ballot at the said polling place, as aforesaid, and in the presence and hearing of him, the said Alexander Batton, declare and threaten in substance and to the effect following: That in the event he, the said Alexander Batton, should then vote and deposit his ballot at said polling place, he, the said Patrick Cahill, would cause him, the said Alexander Batton, to be arrested. That by means of said declaration and threat so made, as aforesaid, the said Patrick Cahill did then and there prevent said Alexander Batton from voting and depositing his ballot at said polling place, and did then and there thereby prevent said Alexander Batton, a qualified voter, as aforesaid, from fully exercising the right of suffrage, contrary to the form of the statute of the United States in such cases made and provided, and against their peace and dignity.

“WILLIAM H. BLISS,  
“Attorney of the United States, Eastern District of Missouri.”

It was remitted to the circuit court, on motion of the district attorney. The other facts are sufficiently stated in the opinion of the court.

*William H. Bliss*, for the United States.

*Marshall & Barclay*, for defendant.

TREAT, D. J. The demurrer is special to each of the two counts:

(1) The facts on which depended the right of Batton to vote are not set out; (2) There is no allegation that the election was for a representative in congress. The indictment is designed to charge an offence under section 5511, Rev. St., for unlawfully preventing a qualified voter from freely exercising the right of suffrage, etc.

It is contended by defendant that it is not sufficient in an indictment to charge generally that the person whose vote was refused, or who was prevented from voting, was “a qualified voter,” but that the several facts on which his right to vote depended should be set out. Reference has been made to several authorities in support of the proposition. While it may be conceded that where a person offering

to vote sues an officer of election for refusing his vote, or where he is the party plaintiff whose right of action is dependent on his legal qualification, he should set out the facts on which his qualification rests; yet that rule does not apply where, as in this case, the defendant is not the voter, but a defendant in a criminal proceeding against him for unlawfully interfering with the voter. It will devolve on the United States at the trial to show affirmatively that Batton was a legally-qualified voter, entitled to cast his vote for a representative in congress at the election named, but the detailed facts on which his qualification depends need not be averred in the indictment.

The other ground of demurrer is well taken. True, an indictment, using the same terms, was before the United States supreme court, but its attention was not directed to the point now under consideration, nor does it appear what, in that case, was the full language of the court.

It is clear that no federal statute can interfere with voters, except at an election for representatives in congress, and then only as to their protection in voting for a representative in congress. Hence it is essential that it be charged in the indictment that "at an election for representative," etc., the offence was committed; and it is not sufficient to allege that "at an election at which a representative was voted for," etc. It may be that the election in question was for some other purpose, over which the federal government had no control, and with which it had no right to interfere. But the defect is still graver when it is averred that at an election where a representative was voted for, Batton was a qualified voter, etc., and entitled to vote, and that, when proceeding to offer and deposit his ballot, he was prevented by threats and intimidation; yet nowhere is it alleged that he offered, or proposed, or was about to vote for, or was qualified to vote for, a representative in congress.

It would hardly be contended that because congress may pass a law to control congressional elections and protect voters against unlawful or violent interference with the right to vote for congressional representatives, therefore, whatever occurred at an election which did not interfere with such a right must be considered within the terms of the act, because the words are general, viz.: "Unlawfully prevents any qualified voter of any state \* \* \* from freely exercising the right of suffrage," etc. The language must necessarily be so construed as to confine the provisions of the statute within constitutional limits.



There was a suggestion made by defendant's counsel in argument as to the so-called threat, as set out in the second count; but as the special demurrer raises no such point, the court does not pass upon it. It may be that the specific language should be construed as qualifying the general averment; and if, without further averments, the specific language was not an unlawful threat, the indictment would fall.

While it is of great importance that purity of elections and the free exercise of the right of suffrage be enforced in all cases, yet it is equally important that there be no usurpation of jurisdiction, one tribunal with another. So far as the act of congress takes supervision of elections for representatives in congress, there is no difficulty as to federal jurisdiction; yet there may be mixed elections, or elections at which local officers alone are to be voted for.

If, at a mixed election, a voter appears to cast his ballot solely for a state or municipal office, and is interfered with in his attempted exercise of that privilege, or if, under the state law, he is qualified to vote for local officers, and not for a representative in congress, and is interfered with, does the act of congress apply? Hence, should not the indictment specify that the election was for a representative in congress; that the voter was qualified to vote for a representative at the time and place averred; that said qualified voter appeared at the polls and offered or attempted to vote for a representative in congress; and that he was unlawfully interfered with in such attempted exercise of that specified right?

If this be not so, then the federal jurisdiction must be held to extend to whatever local elections are held at which any one casts a vote for a representative in congress, whether the election be for that purpose or not; and that if at such an election a vote is cast for such a representative, any one who appears to vote for a local officer cannot have his vote challenged without incurring the penalty of the federal law. These extreme cases are stated to illustrate the position that the indictment must contain needed averments to bring the alleged offence within the constitution and laws of the United States. The court holds that the offence must be charged to have been for interference "at a congressional election" with a voter-qualified to vote and offering to vote for a representative in congress.

The demurrer is sustained.

WISWELL, Assignee, v. JARVIS and others.

(District Court, D. Maine. 1881.)

1. FRAUDS—VOLUNTARY CONVEYANCE BY A HUSBAND TO HIS WIFE—CREDITORS.

A voluntary conveyance by a husband to his wife of a valuable estate is, by the law of the state, *prima facie* fraudulent as to then existing creditors.

2. HUSBAND AND WIFE—VOID AGREEMENTS.

An understanding between a husband and wife that on his death she should have all of his estate for the use of herself and children imposes no legal liability on the husband. Therefore, where a husband, a ship-master, on proceeding to sea makes a conveyance of his property to his wife by way of carrying out such an understanding, the conveyance is without consideration.

3. SAME—VOLUNTARY CONVEYANCE—CREDITORS.

At the time such conveyance was made it appeared that the husband was indebted to the amount of \$3,000 only; that he retained of personal property more than fourfold that amount; that for at least four years the creditors could have received their full pay at any moment, he having offered to pay them and they having refused it; and that, subsequently, by extraordinary misfortunes, he lost nearly the entire amount of his personal property. *Held*, that the conveyance could not be set aside by these creditors as being fraudulent and void under the statutes of Elizabeth.

4. REV. ST. MAINE, c. 61, § 1.

Nor can the conveyance be attacked under the provisions of chapter 61, § 1, of the Revised Statutes of Maine, which declares "that when property is conveyed by the husband to his wife without a valuable consideration made therefor, it may be taken as the property of the husband, to pay his debts contracted before such purchase."

*Andrew P. Wiswell, pro se.*

*Henry L. Mitchell, for respondents.*

Fox, D. J. This bill was filed June 22, 1880, by the assignee of Francis H. Jarvis, against the bankrupt and his wife, to set aside a conveyance of a house and lot in Castine, in this district, made by the bankrupt to his father-in-law, Alfred Hovey, on the fifteenth day of March, 1871, and by him conveyed to Mrs. Jarvis on the third day of April of the same year. (Jarvis was, on his own petition, filed August 17, 1878, adjudged a bankrupt by this court.) Said conveyances are charged to have been without consideration, and fraudulent and void, under the statutes of Elizabeth, as to existing creditors, two of whom have proved their debts in bankruptcy, viz.: C. J. Abbott, executor of estate of Jonathan Perkins, deceased, to the amount of \$931; and Andrew J. Jarvis, to the amount of \$2,147.92. The value of the estate so conveyed is alleged to have been about \$5,000. It is also charged that said conveyance was fraudulent and void as to subsequent creditors, and was made with an intent to defeat the provisions of the bankrupt act.

Mrs. Jarvis, in her answer, denies all fraudulent purpose and intent, and alleges that the conveyance was made to her, through the intervention of her father, by her husband, in pursuance of oft-repeated promises by him that he would settle the premises upon her for her share of the property which she had helped to accumulate; that at the time of the conveyance he was in Boston, about to proceed to sea as master mariner, and there executed the deed for the sole benefit of herself and her children, and the same was, on the nineteenth of July, 1871, duly recorded. In her answer she alleges that her husband was, at that time, the owner of more than \$15,000 of available property, exclusive of these premises, and that he did not then owe in all more than \$3,000. She further states that they were married December 20, 1846; that each year she received from her father large sums of money, for her own separate use and benefit, which she used from year to year for the general support of herself and family, relying entirely upon the representation of her husband "that he was the owner of \$10,000 or \$20,000 of available property, over and above all his liabilities; that he was doing a good paying business as a ship-master; and that he had made ample provisions so that if he was taken away or lost at sea his whole property would vest in her for the use of herself and four children;" and she believes "that if the various large sums of money which were presented to her by her father had been put at interest they would have amounted to a sum about equal to, or more than, the value of said premises." She further alleges "that after this conveyance her husband offered to pay each of these creditors, Perkins and Jarvis, the full amount due them, but they each requested him to retain the money, paying them their interest, which he did up to 1876," and she believes "they had full notice of the deed to her of the premises, and assented thereto." She alleges—

"That in January, 1872, the bankrupt owned three-fourths of brig *Mountain Eagle*, of the value of more than \$6,000, and was in command of her at that time, with all his nautical instruments on board, of the value of about \$500; that this brig, with the property, was then wrecked, with only \$1,500 insurance; that he also owned one-fourth of brig *Isabella Beaman*, which was wrecked in 1873, and her husband thereby lost more than \$3,000; that he also invested \$2,150 in *Castine Brick Company*, which was run for three or four years without any dividends or income, and that in 1877, the property of the company not being in excess of its liabilities, he surrendered up all his interest in it, and thereby sustained a cash loss of \$2,150; that in 1873 he purchased \$4,000 of *Western Connecticut Railroad bonds*, at 90 cents on the dollar, which subsequently fell greatly in value, and were sold by him in 1877 and

1878 at 15 to 20 cents on a dollar, thereby losing about \$3,000, making in all a loss of about \$15,000, all subsequent to the date and record of said conveyance."

The answer of Francis H. Jarvis is not so full and detailed as that of his wife. It denies all fraudulent purpose and intent in making the deed; denies that he was then insolvent; and alleges "that he was then worth and possessed of more than \$12,000, over and above all liabilities, not including this homestead estate now in question; that his wife received from her father, from year to year, large sums of money for her own use, which she used for the support of the family, upon the belief that he would see that she was fully protected for the future by a transfer of the premises in question; and he believes that if all these sums had been put at interest they would have exceeded the value of the premises." He admits his indebtedness to the two creditors, as set forth in the bill, and that they are still unpaid, but he alleges—

"That as late as 1875 and 1876 he offered to pay each of them all their dues, but that they each informed him they preferred to hold his notes and receive their interest, which he continued to pay them up to 1876; that he always intended and believed he was fully and amply able to pay each of said parties the full amount due to them on demand until he became unable to do so on account of a loss of all the property owned by this respondent from 1872 to 1877."

In the argument in defence it is urged "that the husband became indebted to his wife for the sums she from time to time received from her father, and which were applied by her to the support of herself and children, and that this indebtedness constituted a good and valuable consideration for this conveyance to her." No such claim is made by the wife in her answer. She says the deed was made to her "in pursuance of repeated promises of her husband that he would settle the premises upon her for her share of the property, which she had helped to accumulate." This, in other words, is nothing more than an assertion of a gift to her of the premises, or rather an agreement how he would dispose of his estate; but it is not an averment that she loaned him the sums of money she received from her father, or that she expended them for the common benefit, under a promise that he would repay her therefor, and that this deed to her was thus made in discharge of such liability to her. Taking the whole answer, all that can be gathered therefrom is that there was an understanding between her and her husband that on his death she should have all of his estate for the use of herself and children, and that when

about to proceed to sea, from Boston, this transfer was made in pursuance of this agreement. Such an agreement imposed no legal liability on the husband, did not constitute him in law the debtor of his wife, and does not afford any legal support to this conveyance.

This view is fully sustained by the opinion of *Lowell, J.*, in *In re Blandin*, 1 Low. 543, and of *Hunt, J.*, in *Humes v. Scruggs*, 94 U. S. 22. The case, therefore, is that of a voluntary conveyance of a valuable estate by a husband to his wife, and the question is whether it can stand against an assignee in bankruptcy, representing creditors to the amount of \$3,000, whose debts were contracted prior to such conveyance. The law upon this subject is now well settled in Maine, by the decision in *French v. Holmes*, 67 Me. 186, where it was decided "that a voluntary gift by husband to his wife, if he be indebted, is *prima facie* fraudulent as to creditors." "This may be rebutted by the circumstances of the case and by proofs, and whether the gift is fraudulent or not is a question of fact, to be determined by the jury."

In *Kehr v. Smith*, 20 Wall. 35, the rule as stated by *Davis, J.*, is "that a voluntary post-nuptial settlement will be upheld if it be reasonable, not disproportionate to the husband's means, taking into view his debts and situation, and clear of any intent, actual or constructive, to defraud creditors."

In *Kent v. Riley*, L. R. 14 Eq. Cas. 190, the marginal note to the decision of the master of the rolls is: "In the absence of actual intent to defeat, delay, or hinder creditors a voluntary settlement made by a settler in embarrassed circumstances, but having property not included in the settlement, ample for payment of the debts owing by him at the time of making it, may be supported against creditors, although debts due at the time of the settlement may to a considerable amount remain unpaid."

What, then, was the bankrupt's condition at the time of this conveyance, on the eighteenth of March, 1871, his petition in bankruptcy not being filed till more than seven years afterwards, viz., August 17, 1878. In his answer he states the entire amount of his liabilities at that date as not exceeding \$3,000, and there is no evidence in contradiction of this amount. The bankrupt also says in his answer "he was worth and possessed of more than \$12,000 over and above all liabilities, not including the property in question; that he intended to and would have paid all he owed if it had not been for his losses sustained from 1872 to 1877." Mrs. Jarvis states in her answer the property owned by her husband in March, 1871, and what finally

became of it. First she specifies his interest as owner of three-fourths of brig Mountain Eagle, of which he was master, and which, with his instruments, she values at more than \$6,000, all of which were totally lost, with an insurance of but \$1,500, making his net loss by that disaster amount to \$4,500. To disprove the alleged ownership of the husband in this brig, the complainant, at the hearing, produced from the records of the custom-house a copy of this vessel's enrollment, bearing date December 1, 1869, which recited that the bankrupt on that day had sworn that he was the owner of but one-sixteenth of this vessel. The admission of this copy was objected to, on the ground that the paper had never been filed as testimony in the cause, and no notice had been given that it would be produced in evidence; and it was urged that, under the practice in equity in the circuit court, exhibits and documentary evidence must be filed before publication. This case, however, did not proceed under the rules and practice in equity, as established in this circuit, but by an understanding of the parties that it should be heard at the Bangor term upon such evidence as either party might then offer, and witnesses on both sides were then produced and examined orally before the court. This document, therefore, was not inadmissible upon this ground.

By chapter 82, § 100, Rev. St. Maine—

"Copies of enrollments of vessels, or of any other custom-house records or documents deposited in the office of the collector of customs, attested by him or his deputy under seal of office, may be used in evidence and have the same effect as the production of the records in court, verified by the recording officer in person."

Would the original record of enrollment in this case be admissible in evidence, in contradiction of the testimony of the defendants as to the bankrupt's ownership of three-fourths of the Mountain Eagle?

In 1 Greenleaf on Evidence, § 494, it is said:

"Such a document is not of itself evidence of property, except so far as it is confirmed by some auxiliary circumstance showing it was made by the authority or assent of the person named in it, and who is sought to be charged as owner."

This document is found on the files of the custom-house, and recites that the bankrupt had taken or subscribed an oath that he was the owner of one-sixteenth of the Mountain Eagle; but there is nowhere in evidence any copy of such an oath, and the enrollment does not even state before whom it was taken. There is no evidence that the bankrupt ever saw or knew of the paper before it was read at the

hearing; and the court is strongly inclined to hold that, under all the circumstances, it was not admissible for the object contemplated. If, however, it is received, it was not sufficient to establish the falsity of the statements of both of the respondents as to the ownership of the bankrupt in this vessel. Mrs. Jarvis, in her answer, states that he was the owner of three-fourths, and her husband, in his deposition taken August 16, 1880, also swears that in April, 1871, he owned that interest in her. His attention was not called to this enrollment; no explanation was demanded of him in relation to it; but his testimony upon this point was left as originally given by him, without intimation of what was disclosed by the custom-house records.

This enrollment was made December 1, 1869; the deed was given in April, 1871,—more than a year after,—and if the fact was conceded that in 1869 he owned but one-sixteenth, it would not be very cogent testimony to discredit two witnesses who testify that in April, 1871, he was then the owner of three-fourths, as property of this nature is constantly changing ownership. It is also a matter of some importance that there is not produced, from the custom-house, copies of any conveyances of this vessel, or of her register, obtained subsequent to this enrollment, as she was, when lost, sailing on a foreign voyage under a register, or any evidence that the records and files of the custom-house do not disclose that such instruments never existed. In the opinion of the court the evidence does not disprove the ownership of the bankrupt in three-fourths of the *Mountain Eagle* in the month of April, 1871.

The answer of Mrs. Jarvis and the deposition of her husband assert his ownership, at that time, of one-fourth of the brig *Isabella Beauman*. This statement the complainant would disprove by a copy, duly attested, from the custom-house, of a bill of sale of the one-fourth of said brig from the bankrupt to Andrew Jackson Jarvis, dated March 8, 1867, and recorded March 19 of the same year. This copy is also objected to. Would the record itself of this deed be admissible as evidence of ownership without any proof whatever of the execution of the original instrument?

Copies of deeds are generally inadmissible to prove their contents. In this state, "office copies of deeds of real estate are admissible in actions touching the realty, but in all other actions the general principle of the law of evidence prevails, that a party offering to prove a fact by deed must produce it and prove its contents." Per *Shepley, C. J., Hutchinson v. Chadbourne*, 35 Me. 192; *Kent v. Weld*, 2 Fairf. 459.

This copy, therefore, was inadmissible, but if admitted would have been wholly insufficient, executed in 1867, to establish that in 1871 the bankrupt was not then owner of one-fourth, when he and his wife had both sworn that at that date he did actually hold that interest in this brig. That he subsequently invested in the brick-yard \$2,250, which was apparently a valuable and safe investment, is not questioned. His other property was in bonds,—\$4,000 or \$5,000,—which in his deposition he says he then held, but which were subsequently, in 1873, converted into Connecticut Western Railroad bonds, costing him 90 per cent., but from which he eventually realized only about 20 per cent. The testimony of John H. Jarvis was “that about a year after the deed was made he sold some government bonds belonging to the bankrupt, and with the proceeds purchased \$6,000 of Connecticut Railroad bonds;” thus corroborating the statement of the bankrupt and his wife, and fully satisfying the mind of the court that he was the owner of \$4,000 or \$5,000 of government bonds, probably the larger sum, as with the proceeds he acquired \$6,000 of the railroad bonds at 90 per cent. That there was no actual fraud intended by this deed, is demonstrated by the undisputed fact that a number of years after its date he offered to pay both of the creditors who have proved their claims the full amount he was then indebted to them, which they declined to receive, preferring to retain without any security his notes, and collect their interest from him. There can be but little question that these creditors, one of whom, if not both, was a resident in Castine, in the same town with the bankrupt, must have been aware of this conveyance, and their actions are strongly corroborative of the testimony that the bankrupt was then a man in good credit, of ample means to discharge all his liabilities. To one of these creditors the bankrupt says “he offered a government bond in payment at the then premium.” This was the equivalent of cash, as the party could have disposed of it at any moment, and establishes that he was then the owner of such securities, and is in confirmation of the other testimony in the cause.

Upon all the evidence the court is well satisfied that the bankrupt, at the time of this conveyance, acted in perfect fairness towards all his creditors, without any purpose or intent to hinder, delay, or defraud them in any respect; that he was owing but \$3,000, and he retained of personal property more than fourfold that amount; that by most extraordinary misfortunes he finally lost nearly this entire sum, without fault on his part; that for at least four years the creditors could have received their full pay at any moment, the



bankrupt having offered to pay them and they having refused it. Under these circumstances, while the result has proved unfortunate to these creditors, they have no good cause of complaint against the bankrupt and should not be allowed to attack this deed to his wife, which was only a reasonable and proper provision for her and her family as then situated.

The complainant invokes the provisions of chapter 61, § 1, Rev. St., which declares "that when property is conveyed by the husband to his wife without a valuable consideration made therefor it may be taken as the property of the husband, to pay his debts contracted before such purchase." This provision was before the supreme court of this state for consideration in *Winslow v. Galbraith*, 50 Me. 91, and it was held "that it must not only appear that the property came to the wife from the husband, but that it was fraudulent as to creditors." The case of *French v. Holmes*, before cited, is of similar effect.

The result, therefore, is that the complainant fails to sustain his case, and the bill must be dismissed; but as the assignee is without any funds belonging to the estate costs are not awarded against him.

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PLATT, Assignee, etc., v. MEAD and others.

(District Court, S. D. New York. July 18, 1881.)

1. BANKRUPTCY—FRAUDULENT CONVEYANCES—EXISTING AND SUBSEQUENT CREDITORS—PLEADING—PRIMA FACIE CASE.

An assignee in bankruptcy makes out a *prima facie* case for resorting to real estate, with the improvements that have been made thereon since its acquisition, to subject it to the payment of debts contracted subsequently to the time of its acquisition as well as before, by alleging the existence of the indebtedness; that the property was purchased by the bankrupt, and the consideration therefor was paid by him, but that the title was taken in the name of the wife; that a judgment had been recovered by the prior creditor, and an execution thereon had been returned unsatisfied; and that the bankrupt had conveyed the property with intent to defraud both prior and subsequent creditors, without consideration, to a grantee with knowledge acting in collusion with him.

2. PLEADING—INTENT TO DEFRAUD.

An avèrment of an intent to defraud is one of fact, not one of a conclusion of law.

In Bankruptcy. Demurrer to amended bill of complaint for want of equity.

Nelson Smith, for complainant.

P. W. Ostrander and Wm. W. Ladd, Jr., for defendants.

BROWN, D. J. The plaintiff is assignee in bankruptcy of Abraham Mead, who was adjudicated a bankrupt, on petition of his creditors, on June 29, 1878. The assignee was chosen and the statutory assignment of the bankrupt's effects executed to him on September 6, 1878. On the twenty-fourth of August, 1880, this suit was brought for the purpose of reaching certain real estate, in this city, purchased by the bankrupt in 1867, with his own means, the title to which was taken in the name of his wife, the defendant Sarah J. Mead, together with the improvements afterwards made thereon by the bankrupt, and to subject the property to the payment of his debts then existing and subsequent.

The amended bill alleges that the bankrupt, in the early part of 1867, being a plumber and builder, contracted for the purchase, in his own name, of four lots of land on the north-east corner of Sixth avenue and Fifty-fifth street; that he paid \$30,000 therefor, and caused the conveyance to be made from the seller to his wife, Sarah J. Mead, by deed dated and recorded May 22, 1867; that he was then "largely indebted and in embarrassed circumstances;" that one Littlefield then held a judgment against him recovered by default in the New York court of common pleas, and docketed June 18, 1866, for \$3,183; that in August, 1866, on Mead's application, the default was opened, and he was allowed to come in and defend, the judgment meantime to stand as security for whatever might be recovered thereon; that final judgment was recovered in that action on April 29, 1875, for \$5,118.28; that upon execution issued to the sheriff of the county the sum of \$953.09 was made, and as to the balance the execution was returned unsatisfied on February 24, 1876, and that the residue of the judgment still remains unpaid; that the bankrupt purchased said lots for the purpose of erecting buildings thereon; that he shortly after entered into possession of them, and prior to September 1, 1873, and mainly in 1869, 1870, 1871, and 1872, erected five brown stone-front dwelling-houses thereon, in which he expended and invested upwards of \$125,000; that he procured the title to be so conveyed to his wife, and paid the purchase price therefor, with intent to prevent the property from being subject to the lien of Littlefield's existing judgment, with intent to contract future debts and to defraud future creditors, and made the subsequent improvements and expenditures upon the property with the same intent; that while erecting the buildings, and after completing them, he gave out and caused it to be understood and believed generally that he was the owner thereof, and on completion he occupied a part of the premises,

and let and rented the rest, and collected the rents in his own name and appropriated the moneys to his own use; that he thereby acquired credit and standing in the community as a person entitled to credit, and upon such credit contracted divers large amounts of debts with intent to hinder, delay, and defraud his creditors, to-wit, some 10 persons especially named holding claims to upwards of \$40,000 still unpaid, besides others not named; that his wife was privy to the designs alleged, and aided therein, and held the title in secret trust for her husband; that by deed dated June 22, 1875, and recorded June 24, 1875, said Abraham Mead and wife conveyed said premises to a relative, the defendant James C. Mead, a baker, of little or no property, carrying on a small business at Sing Sing, for the nominal consideration of \$300,000, the estimated value of the property, subject to mortgages for \$172,150 and taxes of 1874; that James C. Mead paid no consideration for such conveyance, and took the title in aid and furtherance of the fraudulent scheme of said Abraham Mead and Sarah Mead to hinder, delay, and defraud creditors, to cover the premises from them, and to complicate and embarrass them in obtaining payment of their debts out of the said premises; that said James never took actual possession, but that Abraham is still in possession, claiming that he collects the rents as agent of James.

The original bill did not state any facts in regard to Littlefield's existing debt, except the original judgment of 1866, nor specify any subsequent creditors or their claims. The demurrer to the original complaint was, therefore, sustained on the ground that the complaint did not disclose, as to Littlefield, any existing equity which the assignee could enforce, and as to subsequent creditors none were shown to have been defrauded where claims are still unpaid. These objections do not apply to the amended bill, which shows numerous subsequent creditors, alleged to have been thus defrauded, holding claims to upwards of \$40,000 still unpaid, and that final judgment was not recovered in Littlefield's favor until April, 1875. From the opening of the default in August, 1866, until final judgment in 1875, Littlefield could neither issue execution nor file any bill in equity based on his first judgment by default. His equitable cause of action did not accrue until after the final judgment in 1875, and execution returned unsatisfied. He had six years from that date, but for proceedings in bankruptcy, in which to proceed against any equitable assets of his judgment debtor. N. Y. Code, §§ 382, 1871; *Eyre v. Beebe*, 28 How. (N. Y.) 333.

Upon the facts stated in the complaint, Littlefield, as a creditor existing at the time of the original purchase, could plainly have maintained an action for the relief here demanded.

The Revised Statutes of New York provide that where a conveyance is made to one person, and the consideration therefor is paid by another, no trust shall result in favor of the latter, (thereby abolishing the former rule in equity,) but that such conveyance shall be presumed to be fraudulent as against creditors, and that a trust shall result in favor of his then existing creditors, unless a fraudulent intent be disproved, to the extent necessary to satisfy their just demands. Rev. St. 728, §§ 51, 52. The latter clause is merely declaratory of the existing rule in equity. The trust in favor of existing creditors arises under this statute by presumption of law, in the absence of any proof as to the intention of the parties. And such a constructive trust, in the absence of any proof of the intent of the parties, arises only in favor of creditors then existing. *Underwood v. Sutcliff*, 77 N. Y. 58. The statute is silent as to the effect of such a transaction in cases where there is proof of an actual intent to defraud both existing and subsequent creditors. And if such an investment of a debtor's funds is part of a premeditated scheme to defraud both present and future creditors, such as is set forth in this bill, and through the debtor's ultimate insolvency they are thereby defrauded, I see nothing in this statute which would necessarily abolish the former remedy in equity allowed to subsequent creditors in such a case, and I am not aware that it has been so decided. The contrary has been adjudged by the supreme court of the state. *Mead v. Gregg*, 12 Barb. 653. In *Ocean Bank v. Hodges*, 9 Hun. 161, a fraudulent intent was not found, but the court say it did not exist.

That question, however, does not properly arise in this case. Littlefield was an existing creditor in 1867, at the time of the payment by Abraham Mead of \$30,000 as the consideration of the conveyance to his wife. The recovery of final judgment in 1875, and return of execution unsatisfied, are the appropriate and conclusive legal proofs of the "necessity" of resorting to the constructive trust declared by the statute to arise in his favor from such a payment by his debtor. As this right of action is not yet barred by lapse of time, the plaintiff, as assignee and representative of creditors, is entitled to enforce the statutory trust for the payment of that debt and consequent relief of the estate in the assignee's hands. *In re Duncan*, 14 B. R. 32. No other allegations are necessary to make out a *prima facie* case, so far as respects this claim, than those of the existing indebtedness, the

payment of the consideration by Mead, the recovery of judgment, and return of execution unsatisfied.

It is urged on the part of the defendants that the assignee could not maintain such an action as the present upon the claim of Littlefield alone, or for the benefit of a single creditor, but only such actions as affect the whole body of creditors. Without considering the soundness of this objection as a general proposition, it is enough to say that a recovery in this action, even upon Littlefield's claim alone, would enure to the benefit of the whole body of creditors; for it would by so much relieve the other assets in the assignee's hands from Littlefield's share therein, and by so much increase the dividends to the general creditors. And the assignee has as plain a right to relieve his estate from what would otherwise be a charge upon it, by compelling the payment of a provable debt out of any independent fund which is equitably liable for its payment, as he has to collect in any claim to assets for a similar amount. The result to the general creditors is the same, and they are equally and alike interested in both. The assignee, in prosecuting this suit upon Littlefield's claim alone, would act, not for the sake of the benefit to Littlefield, but for the sake of and for the benefit of the creditors generally.

Similar relief, in cases of double bankruptcy, is granted to an assignee upon the same principle of relieving his estate from a charge equitably payable out of another fund, even though it sometimes accidentally results in giving a preference out of another estate to a creditor who, in his own right, had no claim to such a preference. *Ex parte Waring*, 19 Ves. 345; *Ex parte Ackroyd*, 3 De G., F. & J. 726; *Powles v. Hargraves*, 3 De G., M. & G. 430, 458; *In re Barnerd*, L. R. 19 Eq. Cas. 1, (10 Ch. App. 198;) *City Bank v. Luckie*, L. R. 5 Ch. App. 773.

As to the claims of subsequent creditors, it is objected that the assignee, although representing them, stands precisely in their shoes at the time of the bankruptcy, and can maintain no action based upon their claims which they themselves were not then in a situation to bring; and that as no judgment was ever recovered or execution issued upon their demands, no action based on these claims to reach the debtor's equitable assets can now be maintained by the assignee. This objection was considered and is fully answered in the case of *Southard v. Benner*, 72 N. Y. 424, where it was held that the assignee, without judgment or execution, may maintain any such suit in behalf of creditors to reach property fraudulently disposed of, as they

or any of them might, but for the bankruptcy, have thereafter acquired the right to bring.

After bankruptcy no further proceedings at law, such as recovery of judgment and return of execution unsatisfied, are, on principle, necessary to sustain an action to reach equitable assets, for there is no fund or property of the debtor which can, by any possibility, be made available upon execution. When all remedy at law is exhausted, the right to equitable relief arises. But by the assignment in bankruptcy all remedy of the creditor at law is *ipso facto* exhausted. All the debtor's property is thereupon vested by law in the assignee, and no subsequent judgment or execution can touch it. To procure judgment and execution to be returned thereon, even if not stayed by law, would be mere idle ceremonies. The situation is analogous to that of the estate of deceased persons, where the debtor's property is by law distributable to creditors *pro rata*, and not subject to any lien upon an after-acquired judgment. In such cases it has long been settled that a creditor at large may maintain a suit in equity to reach assets fraudulently disposed of by the deceased debtor without the ordinary prerequisites of judgment and execution returned unsatisfied, which in such cases would be wholly useless and unmeaning. Story, Eq. Pl. § 514; *Loomis v. Tift*, 16 Barb. 541; *Alsager v. Rowley*, 6 Ves. 748; *Doran v. Simpson*, 4 Ves. 651. By section 5046 of the Revised Statutes, moreover, "all the property conveyed by the bankrupt in fraud of his creditors is vested in his assignee." This language is not to be limited to technical conveyances of real estate, but is, I think, intended to embrace every species of property or means of the debtor transferred or disposed of by him in any manner which by the law of the time and place of the transaction is fraudulent as to creditors. It includes moneys of the debtor paid for property conveyed to his wife by his procurement, or improvements made by him upon her lots, whenever either is in fraud of creditors. All such property thus vested in the assignee he must have the legal right to recover by any appropriate legal proceeding, so long as, and to the same extent to which, the creditors defrauded might, but for the bankruptcy, have entitled themselves to recover it. *In re Leland*, 10 Blatchf. 503, 507, 508.

Moreover, Littlefield could acquire no lien on the property in question until the filing of his bill in equity. *Clarke v. Rist*, 3 McLean, 494; *Storm v. Waddell*, 2 Sandf. Ch. 494; *Ocean Nat. Bank v. Olcott*, 46 N. Y. 12.

Not having filed any such bill prior to the proceedings in bankruptcy, he would seem to be within the prohibition of section 5106, which prohibits suits thereafter against the bankrupt in law or equity. If so, then suit by the assignee for the same purpose must be allowed *ex necessitate* to prevent a failure of justice; for otherwise both assignee and creditor would be remediless. *Glenny v. Langdon*, 98 U. S. 20. Nor can it be supposed that the statutory period allowed for commencing actions for relief in such cases was intended, by the bankrupt act, to be suddenly cut off and all remedy thereafter precluded for the benefit of the bankrupt who had committed the fraud, or of his fraudulent grantees. If, therefore, upon the facts stated in the bill, the subsequent creditors would have been entitled to equitable relief after the recovery of judgment and return of execution unsatisfied upon their respective claims, I have no doubt that the plaintiff, as assignee in bankruptcy, is entitled to similar relief in this action without those prerequisites.

The other general averments in the bill seem to me to be sufficient upon demurrer to entitle both existing and subsequent creditors to relief. The conveyance to the wife of the lots contracted for by the husband, in his own name, for the purpose of building upon them; his payment of \$30,000; the consideration of the conveyance when largely in debt and in embarrassed circumstances; his subsequent taking possession and building thereon during several years following, and his expending \$125,000 or upwards in so doing; his representations during all this time that he was the owner, and contracting large debts, which are still unpaid, on the strength of the credit so acquired; and the subsequent conveyance of all this property, with more than \$150,000 of the debtor's means thus expended upon it, to a relative in Sing Sing of little or no property, without consideration, followed by the apparent insolvency of both husband and wife,—are stated in the complaint as parts of one continuous transaction, and of a premeditated scheme to cheat and defraud creditors, both existing and subsequent.

Upon these facts, if proved without explanation, a court or jury would be warranted in finding, if not compelled to find, that such was the actual intent. And upon such a finding whatever doubt, if any, may exist as to the liability of the lots to subsequent creditors, to the extent of the original consideration paid therefor, under the New York statute, no doubt can exist as to their right to follow the

land to the extent of the large expenditures and improvements subsequently put upon it by the debtor.

The whole transaction, upon the facts stated in the bill, would be regarded as but one continuous scheme to defraud, and subsequent creditors would be equally entitled to relief. *Sedgwick v. Place*, 5 Ben. 184; *S. C. 12 Blatchf.* 163; *Kehr v. Smith*, 10 B. R. 49; *Shand v. Hanley*, 71 N. Y. 319; *Dewey v. Meyer*, 70 N. Y. 76; *Underwood v. Sutcliffe*, 77 N. Y. 58; *Burdick v. Gill*, 7 FED. REP. 668.

The averments in the bill of actual intent to defraud creditors as the *animus* of all these transactions are not, as counsel for defendants claim, averments of a mere conclusion of law, to be disregarded on demurrer, except as necessarily to be inferred from the other facts alleged. They are averments of an affirmative and essential fact. Upon this fact alone depends all the distinction between cases of actual and of constructive fraud which runs through all this branch of the law. Such an averment of actual fraudulent intent is to be passed upon as a fact; it may be directly testified to as a fact, (*Clarke v. Railroad Co.* 14 N. Y. 570,) and the demurrer must be held to admit it as a fact when pleaded, as in this case, as the motive of transactions which deprived creditors of a very considerable part, if not all, of their means of payment.

Averments of the insolvency of the debtor at every stage of such an alleged scheme to defraud are not necessary to be made or proved. The bill avers that the debtor began largely in debt and ended in insolvency. This is sufficient to cast upon the defendant the burden of proving any fact which may exist to justify, as against creditors, the gift and expenditure of over \$150,000 upon his wife's property. *Pratt v. Curtis*, 6 B. R. 139, 144. Certainly the magnitude of these gifts affords no presumption that they were reasonable in amount or without hazard to creditors, and they must have contributed to, if they did not wholly cause, the debtor's ultimate insolvency. These large gifts and expenditures, through the methods stated in the complaint, are not necessarily incompatible with the debtor's large indebtedness, or even with his pecuniary embarrassment, as alleged in the bill; nor is the prior record of the deed to his wife any sufficient answer to the debtor's subsequent representations, coupled with his occupation and building upon the premises, that he was the owner thereof, upon the strength of which representations creditors trusted him and were defrauded. He might, notwithstanding the prior recorded deed to his wife, have been legal owner, by a subsequent



unrecorded deed from her, or equitable owner upon an agreement with his wife for building on the lots for his own benefit, either of which would not have been an uncommon circumstance.

The conveyance to James C. Meade, in 1875, is alleged to have been made after all the debts alleged in the complaint were incurred, without consideration, and with intent to complicate and embarrass still further any resort to this property by creditors; and it was received by him, as the bill states, in aid and furtherance of the fraudulent scheme therein previously set forth. Such a grantee manifestly acquires no equities and no new rights against prior creditors; and all these creditors were prior to that conveyance. He is not a *bona fide* purchaser or encumbrancer; and to such only do the cases cited by the defendant apply. The deed to him, therefore, constitutes no impediment to the plaintiff's recovery.

The demurrer must be overruled, with liberty to the defendants to answer within 20 days.

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### MEYER and another v. MAXHEIMER.

(Circuit Court, S. D. New York. October 5, 1881.)

#### 1. LETTERS PATENT—REISSUES—INVALIDITY.

A reissue that covers more than the original, (apparently so as to embrace intervening inventions of others,) is invalid.

#### 2. SAME—WIRE CAGES.

Reissued letters patent No. 8,594, for an improvement in wire cages, consisting of an invention of a cage held in shape by the fitting of crimps in the wires to holes in the cross bands, while that in the original is of a cage held in shape by the locking of loops on the wires through slots in the cross bands, are invalid, the inventions being essentially different.

In Equity.

*J. Van Santvoord*, for complainants.

*Arthur v. Briesen*, for defendant.

WHEELER, D. J. This suit is brought upon letters patent No. 139,784, granted to Michael Grebner, June 10, 1873, and reissued to the plaintiffs, February 25, 1879, in No. 8,594, for an improvement in wire cages. Among the defences set up is one that the reissue is for a different invention from that in the original patent. The original patent was for a cage having the horizontal bands provided with slots, through which loops formed outwardly on the upright wires were placed and held by a locking bar, extending around the cage out-

side the band and through the loops, making a firm and durable connection between the bands and wires. After that and before the reissue cages were invented and brought into use having their horizontal bands made tubular, of sheet metal, with holes above and below, through which the upright wires were placed, having bands like loops extending outwardly within the hollow bands to form a connection between the wires and bands. The reissue is for a cage having horizontal bands of sheet metal or other suitable material provided with holes that engage with the vertical filling wires, which have loops or crimps that fit the holes and effectually prevent the vertical displacement of the horizontal band, and a locking-bar like that in the original to prevent either of the filling wires from being pressed in so as to disengage its crimps from the cross or horizontal band. The first claim is for the combination in a cage of filling wires provided with loops or crimps, and cross-bands provided with holes, adapted to engage with the loops or crimps.

There is nothing in the original patent about the engagement of the loops with the slots otherwise than by being held together by the locking bar. The loops shown in the drawing are not shaped to, of themselves, hold the cross-band in place. The connection between the bands and the wires depended wholly upon the locking-bar. The combination mentioned in the first claim of the reissue would not be an operative combination at all with the parts made only as described in the original. The invention sought to be covered by the reissue is of a cage held in shape by the fitting of crimps in the wires to holes in the cross-bands, while that in the original is of a cage held in shape by the locking of loops on the wires through slots in the cross-bands. These inventions are essentially different. The reissue was, apparently, expanded beyond the original to cover the intervening inventions of others. The language of the supreme court in *Swain Turbine & Manuf'g Co. v. Ladd*, 19 O. G. 62, seems peculiarly applicable to this case. It is said there that the statute was never intended to allow a patent to be enlarged except in a clear case of mistake, and that there is no safe or just rule but that which confines a reissue patent to the same invention which was described or indicated in the original. This reissue seeks to enlarge the invention, as well as the patent, and is not supported by the original.

Let there be a decree that the reissued patent is invalid, and that the bill of complaint be dismissed, with costs.

## ZANE and another v. PECK BROTHERS &amp; Co.

*(Circuit Court, D. Connecticut. June 25, 1881.)*

## 1. LETTERS PATENT—SELF-CLOSING FAUCETS—INFRINGEMENT—ANTICIPATION.

Letters patent for an improvement in self-closing faucets, granted June 27, 1865, to Nathaniel Jenkins, are infringed by a faucet differing from the device used by D'Este & Co. only in the particular that what was in that device a swivel, is in this an extension of the screw follower; but not anticipated by the French patent granted to Samy and Lenormand, in 1861, in whose device the valve can be aided in being drawn to its seat by turning the screw in the opposite direction from that required to throw the valve from its seat, while the complainant's patent has a loose joint, *i. e.*, a joint in which the parts act upon each other by a pushing motion, and not by pulling, between the swivel and the valve.

## 2. EVIDENCE.

The proof must be clear to show that an old patent upon an article used in every-day life, and which has long been in demand by the public, was anticipated by an article made in the city of New York 23 years before the knowledge of such anticipation was ascertained.

*Thos. William Clarke*, for plaintiff.

*M. B. Philipp and Charles R. Ingersoll*, for defendant.

SHIPMAN, D. J. This is a bill in equity to restrain the defendant from the alleged infringement of two letters patent—one granted June 27, 1865, to Nathaniel Jenkins; and the other, reissue No. 7,571, granted March 27, 1877, to Francis Roach, assignor to the plaintiffs. The original was dated September 8, 1868. Each patent is owned by the plaintiffs, and is for an improved self-closing faucet.

The validity of the Jenkins patent was sustained by Judge Shepley, in the district of Massachusetts, in the suit of the plaintiffs against D'Este, McKenzie & Bate. The plaintiffs then brought a bill in equity in this district against the present defendants, alleging the use of the same device which had been held by Judge Shepley to be an infringement. The defendant was a licensee of D'Este & Co. Infringement was here admitted, and the validity of the patent was again sustained.

The Jenkins invention was described in the opinion, in the last-mentioned case, as follows:

"The invention consisted in opening a self-closing faucet by means of a quick-threaded screw follower, the threads of which are inclined at so great a pitch that when the power to turn the screw is removed, the pressure of the water, and of a spiral spring under the valve, forces the valve to its seat, where it is held by the pressure of the water. The specification says that another part of the invention consisted in combining with the valve and screw-follower a swivel, so that the rotatory movement of the spindle shall not be

imparted to the valve, which shall have only an axial movement, and thus twisting or friction of the valve shall be prevented. This swivel connection of spindle and valve is frequently used in structures where rotation of the valve is not desired. The faucet has gone into extensive use."

The claims of the patent are:

"(1) The screw-follower, H, in combination with the valve of a self-closing faucet, substantially as set forth, and for the purpose described; (2) the combination of the swivel, P, screw-follower, H, valve, K, and spring, O, substantially as and for the purpose described."

The defendants now manufacture and sell a faucet like the one the use of which was enjoined, except that the former swivel is pinned to the screw-follower, so as no longer to be a swivel, but to be an extension of the screw-follower.

Had it not been for the history of the litigation, the defence of non-infringement would have been strongly pressed; but after the decision of Judge Shepley, and the admission of the defendant in the former suit in this district, it is useless to consider that question, except with reference to the point whether the swivel is included in the first claim of the patent. It is obvious that it is not claimed in terms in the first claim, and that in the specification the two branches of the invention are distinctly set forth.

The principle of the patentee's self-closing faucet was a combination of the several parts by which the valve was to be forced to its seat solely by the operation of the spring and the pressure of the water, and the valve was to be removed from its seat solely by the twisting of the handle of the screw-following apparatus. The screw was to do nothing in forcing the valve to its seat. The spring was to do nothing in removing the valve from its seat. The inclines of the screw were so quick that the spring could immediately force the valve to its seat whenever the person who was using the faucet released his hold upon the handle of the screw-follower. The connection between the screw and the valve must be by contact only, so that when the valve was returned to its seat the spring should do the entire work, and when the valve was forced away from its seat it should be affected by pushing the valve. There could be no rigid connection between the valve and the screw-follower or the swivel.

The operation of the defendant's faucet is thus correctly described by the plaintiff's expert:

"I find the valve having a movement at right angles to the plane of the valve seat, which movement is controlled in the direction necessary for the closing motion to act by means of a spring, and is controlled in the opposite direction by means of a cross-head or handles attached directly or indirectly

to the valve stem, and a quick screw thread or spiral incline. Torsional movement of the cross-head serves to cause the valve stem to traverse in the direction necessary for opening the valve, but the said torsional movement of the cross-head has no effect whatever in forcing the valve onto its seat, as the spiral inclines, that in case of torsional movement at the handle cause the valve to move away from its seat, have no corresponding inclines to force the valve onto its seat. In other words, there is a loose joint or connection between the handle and the valve mechanism that allows the force imparted by the operator to act in one direction,—that is, in the direction necessary to open the valve,—and not to allow of any positive force being communicated from the handle to force the valve onto its seat. This loose joint in Exhibit E consists in the lifting collar or sleeve having the friction rollers and the spiral inclines on the top of the faucet."

"By loose joint" the expert means a joint in which the parts act upon each other by a pushing motion and not by pulling. The loose joint in the Jenkins patent is between the swivel and the valve. It is, therefore, immaterial whether there is a swivel or whether the part formerly acting as a swivel is pinned to the screw-follower. This explanation of the Jenkins patent prevents the French patent of 1861, to Samy and Lenormand, from being an anticipation. The valve of this device can be aided in being drawn to its seat by turning the screw in the opposite direction from that required to throw the valve from its seat. The Chretien Moraud French patent, the only other anticipatory patent apparently relied upon by the defendant, was sufficiently considered in the former case.

The strength of the defence was in the alleged fact that self-closing faucets, constructed substantially like the defendants' device, were made and sold in the city of New York between 1852 and 1856 by F. H. Bartholomew, a well-known manufacturer of hydrants and plumbers' articles, who was also an inventor and patentee of hydrants, valves, and water-closets. Mr. Bartholomew is now dead, and no specimen of his faucet is produced. His former foreman, who is also now a manufacturer of plumbers' materials, has presented a faucet which he considers to be a reproduction of those made by Bartholomew, and which is substantially the defendants' article. If it is a reproduction the Jenkins patent was anticipated between 1852 and 1856.

There is produced on the one hand the testimony of the foreman and of divers workmen, who testify, in substance, that faucets like the sample were made and sold by Bartholomew, and that one was in use in his shop. Other workmen of his who were employed at the same time do not remember such an article. There is also the negative testimony of plumbers, who did business with him, that they never

saw such an article in his stock, and that if such a faucet had been made it would have been in demand. No sales of such a faucet can be recognized upon Bartholomew's book.

The Jenkins patent has been in existence since 1865. The faucet has gone into extensive use, especially in places where an article was required which could endure constant hard wear. Clear proof is required that an old patent upon an article used in every-day life, and which has long been in demand by the public, was anticipated by an article made in the city of New York before 1856; the knowledge of such anticipation having been ascertained about 1879. If the patent had been anticipated by the Bartholomew faucet, it seems palpable that the manufacturers of such articles would have taken advantage of the fact.

The evidence shows that Bartholomew had the idea of a faucet, the valve being drawn from its seat by a key which rode up the inclines of a V shaped cap; that he made such faucets, and sold a few; that they were not a success, and he did not continue the manufacture. He made, as testified by Waldron, three kinds. A duplicate of one of these kinds is in the case. The inclined surfaces of this kind are almost flat on top, and it is not necessarily a self-closing faucet. The point in this part of the case is whether he made the faucet, with a cap having the sharp and deep V, which is shown by Gen. Morrison, and which is also testified to by Waldron and others. It is somewhat significant that the old cap from which the Morrison casting was made is not in evidence. That cap was an important part of the Bartholomew faucet, and Gen. Morrison admits that "the V in the new cap is deeper than in the old cap." The testimony of all these witnesses is merely from recollection of the shape of a few articles made from 23 to 25 years before they testified, and is not sufficient to destroy the presumptions of a patent upon an article which has been long and extensively used. It may be that the present recollection of these witnesses in regard to a comparatively insignificant part of their work between 1853 and 1856 is accurate; but, in the absence of specimens of the work made at the time, such testimony is an unsafe foundation upon which to rest a finding that the patent had been anticipated.

The Bartholomew self-closing hydrant is also relied upon by the defendant. Bartholomew was largely engaged, between 1846 and 1856, in the sale of hydrants which were made under his patent of August 12, 1846. This patent represents the valve as opened by a lever. "Or, instead of this," the specification says, "the valve-stem

may extend through the top of the cap, there to be operated in any desired manner." Gen. Morrison and other witnesses say that Bartholomew made some hydrants before 1856, which went into use in the city of New York, the valves of which were lifted by a handle at the top of the hydrant. The witness says:

"On turning the handle, its incline, coming in contact with the incline on the cap, raised the valve-rod or spindle against the pressure of the spring, at the same time raising the valve from its seat and thus allowing the water to pass. By letting go the handle, the spring returned the valve automatically to its seat, thus making the valve self-closing."

After 1856 none were sold except two which lay in the shop until 1877, and these were sold to Mr. Soffe as exhibits in a suit upon the Jenkins patent. One of these did not have a pitch which would cause the handle to drop when left at any point. The other, which is the exhibit in this case, has a quicker pitch, and, if it ever had been used, might have been treated as an anticipation of the patent. Whether those which were sold for use were like the other Soffe exhibit, or like this, is not made clear. This method of opening the valve was not, apparently, regarded by Bartholomew as important. He laid no stress upon it in his advertisements. He treated it as unimportant in his patent. He made a few, but probably the use of the lever was preferred, and he made no more.

Judge Shepley found that the defendants in the Massachusetts case did not infringe the Roach patent. Since his decision the patent has been reissued, and it is now insisted that there is an infringement of the second and fourth claims. I do not perceive any modification of the original patent which is sufficient to cause a modification of Judge Shepley's opinion. The rotating key of Roach is not used by the defendants.

Let there be a decree for an injunction, and for an accounting as to an infringement of the first claim of the Jenkins patent, and dismissing so much of the bill as relates to an infringement of the Roach reissued patent.

ONDERDONK *v.* FANNING and another.*(Circuit Court, E. D. New York. July 1, 1881.)*

## 1. LETTERS PATENT—LEMON SQUEEZERS—INFRINGEMENT.

Letters patent No. 217,519, granted to Josephine P. Fanning and Isaac Williams, for an improvement in lemon squeezers, being a patent for a combination, one of whose essential elements is a bed on which the lemon is to rest while subjected to pressure, with holes in it to allow the juice of the lemon to pass through into a concentrator below, are not infringed by a machine of which the bed on which the lemon rests while subjected to pressure is solid, with a grooved or corrugated surface so constructed that the juice is conducted to the edge of the bed, where it passes into the concentrator around the bed by running between the edge of the bed and the rim of the concentrator.

*Foster, Wentworth & Foster*, for complainant.

*E. H. Brown*, for defendant.

BENEDICT, D. J. This action is founded upon a patent owned by the plaintiff, No. 217,519, originally issued to Josephine P. Fanning and Isaac Williams, as assignee of the defendant John Fanning, for an improvement in lemon squeezers. The allegation of the bill is that the defendant makes and sells a lemon squeezer similar to that described in the plaintiff's patent. The defendant, among other things, denies that the machine he makes is similar to that secured by the patent.

The patent sued on has been before this court in a former action between these same parties. In that case the infringing machine was different from the machine now complained of, and then a preliminary injunction was granted the plaintiff upon the ground that the circumstances attending the sale of the patent by the defendant to the plaintiff rendered it proper to compel the defendant to refrain from making machines like those there complained of during the pendency of the suit. This was the extent of the adjudication made in the former action. The final decree subsequently entered in that action was upon the consent of the parties, and not upon any determination of the court, either in respect to the validity of the patent sued on, or the character of the alleged infringement.

In the present case, the questions respecting the validity of the plaintiff's patent are the same as in the former action, but the question of infringement is different. The latter question is the only one necessary to be determined on this occasion, in the view I take of the case, and this opinion will therefore proceed upon the assumption that the patent sued on secures to the plaintiff an exclusive



right to the invention which his patent describes. This patent is for a combination, the elements of which are conceded to be old. It contains four clauses, as follows:

"*First*, in a lemon squeezer, the convex perforated bed to receive the lemon, in combination with a concave presser, substantially as specified; *second*, in a lemon squeezer, the convex bed, with a rim around the same, and perforated, in combination with the concentrator below the perforated bed, to receive the juice and pass the same to the tumbler or other vessel, substantially as set forth; *third*, the combination, in a lemon squeezer, of the convex perforated bed, *a*, concentrator, *c*, supporting ring, *e*, standard, *d*, guide-rods, *n*, cup and actuating mechanism, substantially as set forth; *fourth*, the combination, in a lemon squeezer, of the removable convex perforated bed, the supporting ring, *e*, standard, *d*, lever, *g*, link, *l*, and presser-cup, substantially as described.

In each of these claims the bed upon which the lemon rests while subjected to pressure is described as being a perforated bed, and the language seem to plainly indicate that a bed containing perforations, on which the lemon is intended to rest, is claimed as one of the elements of the combination. This conclusion, that a perforated bed is an essential element in the combination claimed, is fortified by the language of the specification. Thus, it is there said:

"I make use of a convex bed or surface for the lemon to rest on. The same is perforated for the passage of the lemon juice." Again: "The perforated bed, *a*, is convex on its upper surface, and it is perforated with numerous holes. There is a rim, *b*, around the same to retain any juice and cause it to pass through the outer perforations." Again: "The perforated bed and concentrator will usually be cast in one piece."

This language, coupled with the language employed in each of the claims of the patent, renders it impossible to construe the patent otherwise than as a patent for a combination, one of whose essential elements is a bed on which the lemon is to rest while subjected to pressure, such bed having holes pierced therein for the purpose of permitting the juice of the lemon to pass through the bed and so into the concentrator below.

If this understanding of the patent be correct, I am unable to discover any infringement of the patent by the defendants' machine, for in the defendants' machine the bed on which the lemon rests while subjected to pressure has no perforations. In the defendants' machine the bed is solid, with a grooved or corrugated surface so constructed that it is impossible for the juice of the lemon to pass through the bed; but the same is, by means of the grooves in the surface of the bed, conducted to the edge of the bed, when it passes into the concentrator around the bed, running between the edge of the bed

and the rim of the concentrator. One machine is constructed to compel the juice to pass through the bed; the other to render it impossible for the juice to take that course. It has been contended in behalf of the plaintiff that the spaces which appear in the defendants' machine between the edge of the bed and the rim of the concentrator are perforations in the bed, within the meaning of the plaintiff's patent. But the word "perforation" conveys the idea of a hole through an article, and cannot, with propriety, be held to describe a space between two articles such as in the defendant's machine is left between the bed and the concentrator. To so read the plaintiff's patent would be to enlarge its scope by giving a strained interpretation to the language employed.

But it is again contended, in behalf of the plaintiff, that the use in defendant's machine of a bed for the lemon to rest on, located inside of the concentrator, with a space between the edge of the bed and the rim of the concentrator, is but the employment by the defendant of equivalent mechanism to accomplish the same result, and for that reason he must be held to infringe. In one sense the result is the same; that is to say, in both the machines the juice is squeezed out of the lemon and caught in a concentrator. But in one the juice is forced by the action of the presser directly through the bed to the concentrator below by means of perforations in the bed. In the other a different direction is given to the juice. It is forced to the edges of the bed, where, by force of gravity, it passes around the edge of the bed and then to the concentrator below. This change in combination is substantial, and not merely colorable, as appears by testimony introduced by the plaintiff, and also by testimony introduced by the defendant.

The plaintiff's witness Frank Stone who used the defendants' machine for some two weeks, squeezing about 300 lemons a day, sold that machine and bought one of the plaintiff's, because, as I understand the witness, the plaintiff's machine does not choke up so fast, nor require such frequent cleansing, as the defendants'. The defendants' witness Hall finds from actual experiment that the perforations in the bed of the plaintiff's machine render it more liable to clog than the defendants' machine, and more difficult to clean. Thus both sides, while they differ as to which machine is the better, agree that the machines perform the work differently. If the fact be, as both sides prove, that a difference exists between the operation of the two machines in respect to the liability to clog, and in the ease with which the machine can be kept clean, and if, as the plaintiff shows, this

difference of itself is sufficient to make the plaintiff's machine more useful when in actual and frequent operation, inasmuch as the only difference between the machines lies in the bed, the conclusion must follow that the substitution of the defendants' bed in place of the plaintiff's bed was more than a mere colorable change of form.

My opinion, therefore, is that none of the combinations claimed in the plaintiff's patent are to be found in the defendants' machine, and that the defendant cannot be held to have infringed the plaintiff's patent by the manufacture and sale of the lemon squeezer described in the bill.

The bill is accordingly dismissed, and with costs.

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THE PANGUSSETT.

THE YANKEE DOODLE.

(District Court, S. D. New York. May 31, 1881.)

1. ADMIRALTY — CROSS-LABELS — COLLISION — TWO SAIL-VESSELS ON CROSSING COURSES, ONE WITH WIND ON PORT SIDE—SEVENTEENTH RULE—LOOKOUT—DUTY OF OFFICER OF DECK—TWENTY-FOURTH RULE—KEEPING COURSE UNDER SEVENTEENTH RULE—CHANGING COURSE BEFORE COLLISION.

Where the schooners P. and Y. D. collided below Barnegat light, off the Jersey coast, about half past 6 A. M., April 6, 1878, the former striking the latter on the starboard side, staving it in, and causing the loss of her mainmast, while the P. had her bowsprit broken, and was otherwise injured, and the Y. D. claimed that when she sighted the P., while she was heading S. W., the wind being W. by N., she first saw her green light half a point on her port bow, and thereupon luffed to S. W. by W., which course she steadily kept to let the P. pass on her port side, but the other's green light drew across her bow, and kept on till it appeared on her starboard bow, whereupon, the vessels being by this time quite near, she kept off to let the P. pass on that side, but both the P.'s lights then appeared, when, by keeping off, she had brought the P. about abeam, showing that the P. had also kept off, and was heading directly for her, and the P. after thus keeping off luffed just before the collision in order to go under the stern of the Y. D.; and the P. claimed that she first saw the other's red light about a mile distant, half a point on her port bow; that this light broadened on her port although the P. had ported a point and a half, changing her course to N. E., but that both lights of the Y. D. then appeared two to three points off her port bow, showing that she was heading towards the P., when the P. put her tiller hard a-port and so held it until the collision:

*Held*, on the evidence, that the Y. D. first saw the other's green light on her port bow when she luffed to N. W. by N., and kept steadily on that course until the P.'s green light appeared on her starboard bow, and therefore that the P. could not have made and held the red light of the other on her port bow, as she claims, but that she must have had the Y. D. on her starboard bow.

That the appearance of the Y. D.'s two lights on the P.'s port bow indicated, or should have indicated, to the latter that she was crossing the course of the

other vessel, and was not caused by the Y. D. changing her course and keeping off, as claimed by the P.

That on the evidence the crossing of the course of the Y. D. by the P., indicated to the Y. D. by the [green light of the P. showing on her starboard bow, and to the P. by her seeing the two lights of the Y. D., led both vessels to keep off; that the Y. D. was the first to make the change, and that this was immediately followed by the change on the part of the P.

*Also held*, the courses of the two vessels crossing so as to involve the risk of collision, that the P., having the wind on her port side and not being close-hauled, was bound, under the seventeenth rule of navigation, to keep out of the other's way.

That her obligation so to do was not affected by the Y. D. luffing one point when she first made the P., and that this was not a fault on the part of the Y. D. which contributed to cause the collision.

That the P. was in fault in not keeping a good lookout, and especially in this: that the mate, who was the officer of the deck and who was at the wheel, was not where he could keep the light of the Y. D. in view after it was sighted and reported by the lookout, his view of it being obstructed by the deck load, and that this fault directly tended to cause the collision.

*Also held*, that the Y. D. was in fault in not keeping her course, under the seventeenth rule, instead of keeping off when she observed that the P. had crossed her bows, which maneuver was not rendered necessary to avoid immediate danger, under rule 24, but, on the contrary, was admitted by her master to have been made in order to aid the P. in her supposed intention to pass on the starboard side, and actually embarrassed the movements of the P. and contributed to cause the collision.

That each vessel being thus brought into immediate danger by the fault of the other, the collision could not be attributed solely to the luffing by the P. just before the collision.

#### In Admiralty.

*Benedict, Taft & Benedict*, proctors for the Yankee Doodle.

*Beebe, Wilcox & Hobbs*, for the Pangussett

СПОРАТЕ, D. J. These are cross-libels for collision. At about half past 11 o'clock on the night of the sixth of April, 1878, the two schooners came in collision off the Jersey coast a little below Barnegat light. The Pangussett was bound from York river, Virginia, to New York, with a cargo of pine wood. The Yankee Doodle was bound from New York to Baltimore with cargo. The night was clear and starlight. The parties differ as to the direction of the wind, those on the Yankee Doodle claiming that it was W. by N., those on the Pangussett that it was N. W. The libel of the Yankee Doodle puts the wind at about W. N. W. I think the weight of the evidence is that the wind was W. by N., about a six-knot breeze. The Yankee Doodle had her lower sails set and two jibs. Her course at the time she made the light of the Pangussett was S. W., and she was making five or six miles an hour. The Pangussett carried double-reefed foresail and mainsail and had one jib set. Her course was N. E. by N.  $\frac{1}{2}$  N.,

when she made the light of the Yankee Doodle. On the deck of the Pangussett were three men—the mate, who was at the wheel, and two seamen, who appear both to have acted as lookouts, one of them being on the forecastle deck, the other on the forward part of the deck-load of wood. On the deck of the Yankee Doodle there were also three men—the master, on the quarter-deck; the mate, who was forward on the lookout; and a seaman, at the wheel. The lookout on the Yankee Doodle reported a light on the lee (port) bow. It was seen at once by the master. It was so distant that at first its color was not discerned, but immediately after it was seen to be a green light. The master and the mate (lookout) both testify that it was about half a point on the port bow. The Yankee Doodle was then nearly as close to the wind as she would lie with her sails full. The master immediately gave an order to the wheelsman to luff one point, and the wheel was ported so that she headed S. W. by W., and she was steadied at that point. The effect was that her sails shook, and her headway was considerably checked. The wheelsman also testifies to seeing the green light under the main-boom after she was heading S. W. by W. The green light drew across the bow and kept on till it appeared on the starboard bow. The master and mate both testify to this, and make it bear half a point on the starboard bow. By this time the vessel bearing the light had approached very near them. Her sails could be distinctly seen, even before she crossed the Yankee Doodle's bow. Up to this time, according to the testimony of those on the Yankee Doodle, the latter vessel was kept steadily on her course of S. W. by W. Her master then gave an order to the man at the wheel to keep hard off. The wheel was thrown hard a-starboard. The object of this movement was, as the master of the Yankee Doodle avows, to give the other vessel more room to pass on his starboard side. The master testifies that when he luffed a point after first sighting the light he expected the other vessel to keep off, show him her red light, and pass on his port side; but when she kept on across his bow, still showing her green light, and was half a point on his starboard bow, he starboarded to give her more room to pass that way. From an observation made to his wheelsman or mate, at the time of giving the order, it would seem that he suspected that the other vessel had not yet seen the Yankee Doodle. He testifies that when he kept off he did not expect a collision. It is not claimed in the pleadings, nor is it shown by the testimony, that this movement was made *in extremis* to ease the blow, or as a desperate movement to avoid an almost inevitable collision. The testimony on the part of

the Yankee Doodle tends to show that soon after the Yankee Doodle had kept off, and when her course was changed to the southward four or five points, so that the light of the Pangussett bore about abeam, the green light of the Pangussett up to that time remaining in sight, her red light also appeared, showing that the Pangussett had also kept off, and had changed her course sufficiently to be heading directly for the Yankee Doodle; that thereupon the main-sheet was let go to make her head off more rapidly, and she was still swinging to the southward, and had got headed round to about east, when the Pangussett came into collision with her on the starboard side, near the main rigging, striking nearly at right angles with the course the Yankee Doodle was then on. The Pangussett had her bowsprit broken off near the knight-heads, and was otherwise injured about the bow. She claims about \$800 damages. The Yankee Doodle lost her mainmast, and was badly stove in the starboard side. She claims about \$2,500 damages. The libel of the Yankee Doodle charges, and the testimony of those on board of her tends to show, that after the two lights of the Pangussett showed nearly abeam she hid her green light and continued to show her red light as she came on, but that just before she struck both lights came in sight again, and then the red light disappeared and the green only remained in view up to the time of the collision; showing, as they insist, that after keeping off the Pangussett changed again and luffed up, probably in order to go under the stern of the Yankee Doodle, and that she was on this luff when she struck.

The case made by the Pangussett is irreconcilable with that made by the Yankee Doodle. A light was seen and reported on the Pangussett, apparently a mile or more away. It was a red light, and so far it confirms the testimony of those on the Yankee Doodle that they saw the light of the Pangussett over their port bow. But the two look-outs on the Pangussett testify that they saw the red light on their port bow about half a point. The mate of the Pangussett could see nothing forward from his position at the wheel, but he swears that at the time it was reported he was standing up on the tiller and saw the red light. He says it was ahead, and, *if anything*, a little on the port bow; that he then changed his course to N. E., porting a point and a half, and steadied at that; that he then stood up again and looked at the light, and it bore a point and a half on the port bow. The men forward also testified that the light broadened on the port bow, but their testimony does not show that they paid much attention to it again till they saw both lights, when one of them ran aft and reported

to the mate that that vessel was keeping off and running down for them. The mate testifies that on receiving this report he put his tiller hard a-port, and put the tiller in the becket and jumped up on the taffrail, and saw the two lights of the other vessel about two and a half to three points off his port bow; that his tiller was kept hard a-port till the collision.

It is evident that if those on the Yankee Doodle saw the *green* light of the Pangussett first on their port bow, and then, after its crossing their bow, on the starboard side, till the vessels were very near together, it is impossible that those on the Pangussett should have seen the red light, and then both lights, of the Yankee Doodle over their port bow, as they swear they did. If it stood merely on the testimony of those on the Pangussett as to their first sight of the red light, it would be quite conceivable that the discrepancy was merely owing to a mistake on their part as to its bearing. The two lookouts made it but half a point to port, and the mate was certainly doubtful if it was to port at all. So small a misjudgment in the bearing of a light is clearly within the range of possibility, but when their testimony shows that they ported, bringing it so much further on the port bow, it seems hardly to admit of the theory of mistake on their part, if, in point of fact, it was, even after their porting, still on the starboard bow, as the testimony of the three witnesses from the Yankee Doodle, if credible, clearly shows. It is suggested, indeed, that those witnesses may have mistaken a red light for a green one. But the theory of color-blindness, which would be very plausible if there were but one witness to the color of the light, is destroyed by the number of the witnesses, and their testimony is too positive to admit of the theory of mistake on their part as to the color. It is necessary, therefore, to determine at the outset which proposition is to be accepted as true—that those on the Pangussett made and held the red light of the Yankee Doodle over their port bow, or that those on the Yankee Doodle saw a green light. Upon the whole testimony I am clearly of opinion that the story of the Yankee Doodle is, in this respect, to be taken as the truth. The testimony of the two seamen on the Pangussett plainly shows that they were not keeping a good lookout for this light after they first saw it. They appear to have looked at it again,—at least, they so testify,—but they do not claim to have kept a steady watch on it as those on the Yankee Doodle did upon the light which they saw. Moreover, the mate of the Pangussett, who was at the tiller, could not see forward, and, until they were

surprised by seeing the two lights of the other vessel bearing down on them, he had, at most, but two very brief glimpses of the light. It was in sight several minutes before the two lights came into their view, and he testifies that having ported enough, as he thought, to clear the other vessel, he asked the lookout, when he thought he ought to see it aft of the deck load, whether it was nearly abeam; that the lookout replied, "Not quite." There is no confirmation of this conversation, and I cannot credit it, because one of the lookouts says that the light was never more than three-quarters of a point on the port bow, and the other does not give it a bearing that could in any sense properly be described as "not quite abeam." But the testimony of the mate clearly shows that although, as officer of the deck, he was bound to keep the light constantly in view after it was reported till all possibility of collision had passed, yet he failed wholly to do so, and, having changed his course, as he thought, sufficiently to clear it, took it for granted that he would clear it, and took no more notice of it till roused by the alarm of the lookout. His testimony as to what was seen from his vessel, therefore, is of very little value. And whether it is a case of false testimony or of gross misjudgment as to bearing, or (what is not impossible) a case of mistaking the light of another vessel on their port bow for the light of the vessel whose two lights they afterwards saw, but whose light they may not have seen at all before, it must be held that they had the Yankee Doodle on their starboard bow, and not on their port bow, all the time, and that if they ported a point and a half, and kept on that new course, as the mate testifies, even that movement did not bring the light of the other vessel on their port bow.

Assuming, then, that the Pangussett was crossing the bow of the Yankee Doodle from port to starboard, showing her green light all the time, it would of course happen, when she reached the point where her course intersected that of the Yankee Doodle, that she would see both lights of the Yankee Doodle. There is no reason, therefore, for rejecting the testimony of those on the Pangussett that, after seeing the red light for several minutes, they suddenly saw both lights. This is in entire harmony with the testimony of those on the Yankee Doodle, that the Pangussett crossed their bow. The men on the Pangussett, however, appear to have inferred from this seeing of the two lights that the other vessel was keeping off across their course. On the theory that they had ported sufficiently to clear her, and that their earlier observation of her bearing was correct, this inference would have been correct. But on the assumption that the light had



been all the time on their starboard bow, it only indicated, or should have indicated, to them that they were crossing the course of the vessel bearing the red light. And crediting, as I do, the testimony on the part of the Yankee Doodle that she kept steadily on her course, N. W. by W., till the Pangussett's green light showed on her starboard side, I must find that this is all that it did indicate, and that the appearance of the two lights was not caused by the Yankee Doodle changing her course and keeping off.

This crossing of the bows of the Yankee Doodle by the Pangussett, indicated to the Pangussett by the seeing of the two lights and to the Yankee Doodle by the showing of the green light on the starboard bow of the Yankee Doodle, was the occasion of a change of course on the part of both vessels. That both vessels, at or very soon after this happened, kept off,—the Pangussett on a hard a-port wheel, and the Yankee Doodle on a hard a-starboard wheel,—does not admit of any doubt. The Pangussett claims to have made this maneuver as the only means of avoiding the collision, because the seeing of the two lights led her mate to believe that the Yankee Doodle, being on her port bow, was keeping off across her bow. If this was the real motive of the movement of the Pangussett, it was based upon a mistake as to the movement and course of the Yankee Doodle, which mistake the mate of the Pangussett was led into by his misjudgment as to the bearing of the Yankee Doodle, and his failure to keep the light reported in view, as he should have done. The motive on the part of the Yankee Doodle is conceded by her master to have been simply to aid the Pangussett in her supposed intention to pass on the starboard hand.

It is not entirely clear upon the evidence which vessel kept off first, but I think the preponderance of the evidence is that the Yankee Doodle did so. The mate of the Pangussett testifies that, on hearing the report that the other vessel was keeping off and running down on them, he instantly hove his tiller hard a-port and put it in the becket, and then jumped up on the taffrail and for an instant saw both lights, and then the red light disappeared and the green alone showed. There is no doubt that the alarm was caused by the lookout discovering the two lights, and it seems hardly possible, if this statement of the mate is true, that the green light of the Pangussett should have showed half a point on the starboard bow of the Yankee Doodle while the Yankee Doodle still kept her course, or that if the Pangussett thus instantly ported on the showing of the two lights her own green light should have continued visible to those on the Yankee Doodle

even after the Yankee Doodle had changed her course several points by keeping off, as her witnesses testify that it did. The speed of the Yankee Doodle had been very much diminished by her keeping so close to the wind. Her master thinks she was not working more than a mile an hour when she kept off. She had more sail on than the Pangussett, and as she kept off she would, of course, increase her speed; and when it was seen that the Pangussett was keeping off also, which was discovered by seeing her two lights nearly abeam, the master of the Yankee Doodle let go her main-sheet, which also tended to give her more speed. But upon first keeping off she must, it would seem, have moved forward less rapidly than the Pangussett did when she first kept off. In view of these circumstances, and the length of time the green light of the Pangussett remained in sight, I am unable to credit this statement of the mate, and think that it is made out that the Yankee Doodle was the first to keep off, and that almost immediately afterwards the Pangussett kept off.

The evidence, I think, shows that the vessels were very near each other when the Yankee Doodle kept off. Her master estimated the distance of the Pangussett when she crossed the bows of the Yankee Doodle at less than a quarter of a mile. Other witnesses make the distance half that or less. There are indications in the testimony on both sides that the time was very brief between the Pangussett crossing the bow of the Yankee Doodle and the collision. The estimates of the time from the first seeing of the light to the happening of that event, and from that event to the collision, make the latter period of time a very small proportion of the whole time the vessels were in sight of each other. When the master of the Yankee Doodle concluded to keep off, his order was to keep *hard off*; and not satisfied with the way the wheelsman turned his wheel he reproved him for not being quick, and put his own hand to the wheel. The wheelsman of the Yankee Doodle thought that if both vessels had kept on they would not have cleared, but might have cleared if the Yankee Doodle had kept on and the Pangussett had luffed up quickly. The master of the Pangussett was lying down in his cabin and heard the alarm of the lookout caused by his seeing the two lights of the Yankee Doodle. He instantly rushed on deck and jumped upon the taffrail, and saw the Yankee Doodle right ahead of the Pangussett, the collision following almost instantly. These circumstances, with others, strongly tend to show that when the vessels kept off they were very near together. On the part of the Pangussett it is denied that she luffed after keeping off. Her mate testifies that her tiller was not

moved again after he put it in the becket till the collision. For the reasons already given his testimony is not entitled to much weight. The proofs tending to show that she did luff are the testimony of the three witnesses from the Yankee Doodle, and the evidence as to the headings of the vessels at the moment of collision. Of the three men on the Yankee Doodle, one, the mate, was forward, and the others, the master and the wheelsman, were on the quarter-deck aft of the point where the Yankee Doodle was struck. They all testify to the shutting in of the green light, and to its reappearance and the hiding of the red light before the Pangussett struck. As to the mate on the bow, this might be the effect of the bow of the Yankee Doodle passing the bow of the Pangussett; but as to the master and wheelsman, this theory does not explain what they saw of the change of lights; and, if their observation and recollection are correct, the Pangussett, after keeping off, must have changed again and thrown her tiller to starboard. There is also a considerable weight of evidence to show that the Yankee Doodle, at the time of the collision, was heading about east. Her wheelsman testifies to seeing the compass at east by south before they came together. Her fore-boom jibed before they struck. The angle of the collision was not far from a right angle. If the Yankee Doodle was heading anywhere near east at the time of the collision, the Pangussett must have luffed up after keeping off to bring her nearly head on, as she was when she struck. This is still more evident, if, as some of the witnesses from the Pangussett, testify, the blow was angling aft or towards the stern of the Yankee Doodle. I think the preponderance of the evidence is that the Pangussett did luff just before the collision.

The questions of fact being thus disposed of, it remains to determine which of the parties is responsible for the collision. The case falls clearly within the seventeenth rule of navigation, which provides that when two sail-vessels are crossing so as to involve risk of collision, if they have the wind on different sides the vessel with the wind on the port side shall keep out of the way of the vessel with the wind on the starboard side, except in the case in which the vessel with the wind on the port side is close-hauled and the other vessel free, in which case the latter vessel shall keep out of the way. These vessels had the wind on different sides. Their courses were crossing, so as to involve risk of collision. The Pangussett had the wind on her port side, and she was not close-hauled. She was bound to keep out of the way. Under the twenty-third rule the Yankee Doodle was equally bound to keep her course. I do not think that the luffing

up of the Yankee Doodle a point nearer the wind, as soon as the light of the Pangussett was discovered, affects the case. It had no tendency to mislead the other vessel, as it did not change the light shown. It made it more certain that the other vessel would see only the red light. The change was made when they were so far apart that it could safely be made without embarrassment, and it did not in fact conduce to the collision. The Pangussett, on making the light of the Yankee Doodle, recognized her duty to keep out of the way if she ported, as the mate testifies, but she failed to make effectual the maneuver intended to be performed of shaping her course so as to pass on the port side of the other vessel, either by not porting enough, or, after porting, by not keeping steady on her new course. This failure is primarily to be attributed to a very gross failure of those in charge of her to keep a good lookout. The negligence of the mate in this respect is especially reprehensible. It is as clearly the duty of the officer of the deck, after a light is reported, to keep it in view and to watch its movements, and the effect of the movements of his own vessel taken with reference to it, as it is of the lookout to see and report a light that comes in view. *The Star of Scotia* 2 FED. REP. 592. Yet this mate, confessedly, was where he could not perform this duty, because of the pile of wood on deck before him; and, upon his own showing, he was navigating his vessel by questioning the lookout as to the movements of the other vessel. On his own testimony, he shaped his course to clear her, as he supposed, and then took no more notice of her till the alarm of the lookout that she was coming down on him, except to put this question to the lookout. This was gross carelessness, and brought the vessels into a position of much greater risk of collision than they were when he first made the light, and directly tended to cause the collision. The responsibility for avoiding the collision, however, was still on the Pangussett, and she made another maneuver by keeping off. This also was a mistake, based upon an erroneous inference as to the previous course and movements of the Yankee Doodle, and is properly to be charged to the previous failure to keep a good lookout.

Yet I am not able to justify the Yankee Doodle in her change of course by keeping off after she saw that the Pangussett had crossed her bows. It was not the case of a movement rendered necessary to avoid immediate danger under the twenty-fourth rule. It is not claimed to be such in the pleadings, nor upon the testimony of the master of the Yankee Doodle himself. He does not testify that the

Pangussett could not, if she had kept her course, have passed safely on the starboard side. Therefore, having departed from the rule which required him to keep his course, he must show that the movement did not contribute to cause the collision, or his vessel will be chargeable with fault. This is not shown. It does not appear that if the Yankee Doodle had kept her course instead of keeping off there would still have been a collision. It is not proven that the Pangussett could not, by keeping off when the Yankee Doodle changed her course, have avoided the collision if the Yankee Doodle had kept her course. Especially, in view of the fact that the speed of the Yankee Doodle was decreased, as her master thinks, to a mile an hour, it was not proved that the relative positions of the vessels and their distance apart rendered this impossible. This being so, the Yankee Doodle had no right to assume that to keep on to starboard was the only possible course for the Pangussett to take. The movement was based upon an inference of the master that the other vessel intended to keep on and pass him on the starboard side. This was a mistake. He had no right to change his course on such a supposition. He was not called upon to aid the Pangussett in the duty the law imposed on her to keep out of his way. The result showed that this attempt to aid not only failed of its purpose, but actually embarrassed the movement taken by the Pangussett to avoid the Yankee Doodle, and contributed to produce the collision. Nor is the responsibility of the Yankee Doodle relieved by the subsequent luffing of the Pangussett just before the collision. Assuming that this was also a mistake, and an ill-judged effort, in the presence of immediate danger, to avoid a collision, yet the vessels were brought into that immediate danger partly by the Yankee Doodle's failure to keep her course, and it cannot be claimed that this last error of the Pangussett alone caused the collision.

Both vessels being in fault the damages must be apportioned. Decree accordingly.

## THE PACIFIC.

(District Court, E. D. Virginia. March 4, 1881.)

## 1. ADMIRALTY—MARITIME CONTRACT.

Materials or machinery furnished, or work done, in the original construction of a ship or vessel, are not maritime in their nature, and do not give rise to a maritime contract.

## 2. SAME—SAME.

Nor can they be made so by a state statute, the only effect of such a statute being to attach a lien to a contract originally maritime in nature, and not to make a contract maritime which is not so originally.

## 3. SAME—SAME.

Hence, a libel *in rem*, on a contract of such a character, dismissed.

## In Admiralty.

In February, 1880, Pardessus & Anthony, who were then residents of New York city, commenced the building of a steam-dredge at Astoria, in New York harbor. Her hull and flooring were completed there, and in the end of April the hull was launched and was towed to Greenpoint, in Kings county, New York, a place near Brooklyn. The timbers used in the construction of the hull were furnished by J. W. Russell, of New York city, and were delivered in New York previous to March 26, 1880. On January 24, 1881, there was still due for the timber on account the sum of \$451.21. Part of the lumber used either in the construction of the hull, or afterwards in the completion of the vessel, was towed to the dredge by V. Vierow. All the timbers so towed were used in the construction of the dredge, a part after her arrival in Norfolk. The above towing was done between February 21, 1880, and September 24, 1880. On January 24, 1881, there was still due on this account the sum of \$159. Whilst being constructed, a number of hands were employed about the dredge to assist in setting the machinery and to do any work that was convenient. Edward Davis and James Richardson, of New York, furnished provisions and supplies for these hands. The items in the bill of Davis ran from March 5, 1880, to September 15, 1880, and aggregated \$261.77. The items of Richardson ran between the same dates, and aggregated \$312.48. After the arrival of the hull at Greenpoint, Long Island, C. H. Tiebout, of Brooklyn, furnished nails, bolts, and iron, which were used in the construction of the parts of the dredge then remaining unfinished. His bill for the same ran between April 6, 1880, and September 20, 1880, and aggregated \$167.03. There was also a bill of Hunter, Keller & Co., of New York, for materials furnished between August 3, 1880, and September 17, 1880, amounting to \$68.54. The engines and various attachments to the boiler and engines were furnished by John J. Hayes, of Brooklyn. The articles so furnished by him were all the first of the kind, and were part of her original construction. The work of this co-libellant was furnished between March 20, 1880, and June 17, 1880, with the exception of an item of \$6, furnished November 5, 1880, after the dredge was sent to Norfolk. The balance due on this claim was \$1,357.76. The boiler for the dredge, and various work accessory thereto, was furnished

by Gustavus Pienez, of New York. This work was also the first of its kind put upon the dredge, and was a necessary part of her equipment as a dredge. The boiler was furnished under a written contract providing that the title should not pass until the notes given for the purchase money were paid. These notes all fell due after the boiler was delivered. The boiler was delivered about August 10, 1880. The other items ran between May 26, 1880, and September 4, 1880. This work was all done while the dredge was in New York. The balance due to Pienez was \$964.49.

The anchors, ropes, and chains were furnished by H. B. Bailey & Co., of New York city, and were all the first of the kind furnished for this dredge. They were furnished between September 8 and 18, 1880, while the dredge was still at New York, and the amount charged for them was \$787.45.

John F. Walsh, of New York, also did work and furnished materials in caulking the hull, while in New York, for which there was due him \$176. The bucket or scoop of the dredge was furnished by Theo. Smith & Bro., of Jersey City. Various other work was also done by them, which was between the dates of June 30, 1880, and August 7, 1880. The bucket was delivered about September 20, 1880, at Jersey City. This bucket and materials were not sent by them to the dredge, but delivered at Jersey City to Pardessus & Anthony. At the time of delivery the dredge was in New York. The contract was that the bucket was to be delivered in Jersey City. The bucket was not attached to the dredge in New York, but was brought to Norfolk by common carriers. While incomplete as a dredge in this and other respects, but at the same time sufficiently complete to risk the voyage, the dredge was towed to Norfolk, Virginia. After arriving at Norfolk this same bucket, which was the first the dredge had, and was necessary to her completion as a dredge, was attached to the dredge for the first time, as also the poles used in hoisting and lowering it. Various other work, occupying in all 10 days, was done upon the dredge after arriving at Norfolk, before it was complete as a dredge and ready for work. It had left New York September 24, 1880, arrived in Norfolk September 29, 1880, and did its first work October 6, 1880. On account of its incomplete construction it worked poorly, and ran its owners heavily into debt. On December 12, 1880, it was libelled for towage, and a decree of sale obtained. Pending the sale under this decree, its owners, on January 8, 1881, sold the dredge to the National Dredging Company, of Washington, D. C., the consideration being \$6,000 in cash, and the assumption by the said company of a dredging contract with the United States government held by Pardessus & Anthony. The purchase money, except a few hundred dollars, was applied by the vendees to the payment of admiralty claims against the dredge held in Norfolk; Pardessus & Anthony assuring the vendees that there were no other admiralty liens on the dredge than those held in Norfolk, and that all their other debts were mere personal obligations, of which part were for the construction and fitting out of said dredge. Immediately on the consummation of the sale, the vendee set to work improving and completing the dredge, and on the twenty-fourth of January, 1881, when the present libel was filed, had spent or contracted to spend \$4,000 on it in improvements, which was swelled to \$7,000 by March 1, 1881. None of the above-named parties filed in New York the specifications of lien required

by the New York vessel law. It was in evidence that the usual mode of building dredges or steamers of any kind is to build the hull, and to place the engines, boilers, and machinery in the hull after its launching, thereby saving the additional weight of the machinery in the process of launching. The value of the dredge at the date of the hearing (March 3) was estimated at \$12,000 to \$15,000. To build a new one like it would cost about \$18,000. On January 24, 1881, the dredge was libelled by Theo. Smith & Bro., and the various other parties named above came in as co-libellants and petitioners. The National Dredging Company appeared as claimant and intervenor.

*Harmanson & Heath, John C. Baker, and Walke & Old*, for the several libellants and co-libellants.

*Sharp & Hughes*, for the claimants.

(1) Supplies furnished and work done for, in, or about the original construction of ships or vessels are not maritime contracts and not enforced by admiralty courts. 20 How. 393; 22 How. 129; 23 How. 494; 1 Cliff. 46; 1 Woods, 290; 2 Hughes, 81.

(2) Not being admiralty contracts, they cannot be made so by state statutes. Such statutes cannot enlarge the admiralty jurisdiction. They cannot change into an admiralty contract what the law meantime declares not to be such. The mere allegation that credit was given to the vessel does not give rise to a maritime contract. The subject-matter of the contract must be maritime. If that is the case, then the party will be presumed to have given credit to the vessel, and this presumption will add to his remedy the action *in rem*. The effect of a state statute is therefore merely to add to the remedy *in personam*, which attaches to all maritime contracts, the additional remedy *in rem*. This is a mere alternation of the means of enforcing an admiralty contract. It is not an addition to the subjects of admiralty jurisdiction. If the subject-matter of the contract is not maritime, it cannot be made so by a state statute. The following extracts from decisions prove this:

"The alteration [of the twelfth rule] applies to the character of process to be used, not the jurisdiction. \* \* \* The states can neither enlarge nor limit the admiralty jurisdiction of the federal courts." 3 Biss. 344, 349, (1872.)

The effect of a state law is merely "to attach a lien to a maritime contract." 5 Ben. 71.

"We have determined to leave all these liens depending upon state laws, and not arising out of the maritime contract, to be enforced by the state courts." 21 How. 251.

"The law of the state begins where the maritime law ends," (*i. e.* the power of a state court to enforce it.) 1 Low. 377.

"It is very obvious that state legislatures have no power to confer any additional jurisdiction upon the United States courts, and it is only where the lien given by the state statute is *in respect to a subject which is maritime in its nature* that admiralty process will lie to enforce it." 2 Parsons, Ship. & Adm. 324.

"There is a wide difference between the power of the court upon a question of jurisdiction and its authority over its mode of proceeding and process. And the alteration in the rules applies altogether to the character of the process to



be used in certain cases, and has no relation to the question of jurisdiction." 1 Black, 526. See, also, pages 529-30 of same case, where it is stated that the lien given by local law must attach to a maritime contract, and that state laws would be enforced only "where it did not involve controversies beyond the limits of admiralty jurisdiction."

"An act of assembly cannot enlarge or regulate the jurisdiction of the admiralty by its own provisions. \* \* \* A lien given by a state may be enforced by a suit *in rem* in the admiralty, but it must be such a suit as the admiralty can entertain; in other words, where the contract or service are maritime, although they are not such as would authorize a proceeding *in rem* in the admiralty, because there was no lien for them; yet when the state law supplies this deficiency and gives this lien, the court of admiralty will enforce it. This is not enlarging the jurisdiction of the court, but the remedy of the party. It does not authorize a suit in the admiralty on the subject-matter, not of admiralty jurisdiction, but only gives a particular remedy for the recovery of the debt." Crabbe, 431-3. "A state statute conferring a lien not maritime cannot confer jurisdiction on the United States courts." 22 How. 129, 132. "A court of admiralty has no jurisdiction of a suit *in rem* against a ship to recover for work, etc., done in building a ship, even though the state law gives a lien therefor." 3 Ben. 163. See, to same effect, 11 Blatchf. 451; 14 Blatchf. 24; 2 Hughes, 48, 49, 52, 54; 43 N. Y. 554, 563. "The admiralty jurisdiction *in personam* does not depend upon the question of lien." 39 N. Y. 27, and cases cited.

(3) If any state law at all applies it is the law of the place where the supplies were delivered, and not the law of the place where the furnisher resides, nor the law of the forum. Of course the *lex loci* governs. The law of Virginia, therefore, has nothing whatever to do with the case. 2 Parsons, Ship. & Adm. 326.

(4) The parties must therefore rest their case, if they have any, on the law of New York. The part of the law giving the lien may be found in 39 N. Y. 21. That law has been construed to be valid, *in so far as it confers jurisdiction upon state courts* for the enforcement of liens contracted in the building of vessels, *for the very reason that such building is not a maritime contract*. There can be no doubt of its validity in so far as it confers jurisdiction on its state courts for the enforcement of liens not maritime but common law. To that extent state laws are, of course, valid, as they do not interfere with the admiralty. All cases that may be cited in opposition to the ground taken above will be found on examination to resolve themselves into this and nothing more. 43 N. Y. 52, 56-7, 554-563.

(5) Even if any of these supplies were of a maritime nature, and the state law could give them a remedy *in rem*, they have no lien under the New York law. That law requires that, in order to preserve the lien, specifications must be filed within 12 days after the departure of the vessel from the port where the supplies were furnished. 61 N. Y. 532-3. In order to avail themselves of the law they must, of course, bring themselves within its provisions. These laws are in derogation of the general law, and must be strictly construed and strictly complied with. *The Lottawanna*, 21 Wall. 558. Not one of the petitioners filed specifications in this case.

(6) A payment on account goes to extinguish that part of the account for which there is a lien. 1 Spr. 206; 2 Parsons, Ship. & Adm. 153.

(7) Giving credit for a longer time than the lien lasts is a waiver of it. 7 Pet. 324, 344; 2 Parsons, Ship. & Adm. 152.

HUGHES, D. J. This is not an action brought upon an ordinary contract by non-residents against a resident in a United States court on its law or equity side. It is a proceeding *in rem* in admiralty, brought in the United States district court as a court of admiralty. Such a proceeding will only lie upon a contract which is maritime. If the claims preferred in this proceeding be maritime, the court has jurisdiction. If they are not maritime, the proceeding is *coram non judice*, and will have to be dismissed. The owners, defendants, contend that the several claims represented by the respective libellants and petitioners here were for the original construction of the dredge Pacific; that such claims are not enforceable in admiralty; and that the court cannot entertain or enforce them in this proceeding, however meritorious in their nature, and however valid in equity and good conscience against the original owners of the dredge, Pardessus & Anthony, who procured the materials to be furnished and the work to be done which constitute the basis of these claims. The propositions of law relied upon by the owners or claimants are correct.

In *People's Ferry Co. v. Beers*, 20 How. 393, the United States supreme court, which gives us the admiralty law, decided, against the then generally prevalent opinion of the district judges, that a contract to build and complete a vessel is not within the admiralty jurisdiction of the United States courts, though the intention should be to employ the vessel in navigating the ocean; and that such materialman or builder, if he has a lien at all, has only the common-law possessory lien, or such statutory lien as local legislation may have created; neither of which, of itself, confers the admiralty jurisdiction. It held that this admiralty jurisdiction, in cases of contract, depends primarily upon the nature of the contract, and is limited to contracts, claims, and services purely maritime, touching rights and duties appertaining to commerce and navigation. It said:

"It would be a strange doctrine to hold a ship bound in a case where the owner made a contract in writing, charging himself to pay by instalments for building the vessel at a time when she was neither registered nor licensed as a sea-going ship."

It declared that the wages of shipwrights have no reference to a voyage to be performed. The court noticed the fact that district courts had recognized the lien of builders and furnishers of material

When the local law gave a lien upon the vessel where it was built; but it said that no such case had been sanctioned by the supreme court. Under this decision a contract, in order to be enforceable in admiralty at all, must be maritime. If it be not maritime no state law can help the jurisdiction of the court, and contracts for building and furnishing material to a vessel in the original construction of it are not maritime contracts.

In the case of *Roach v. Chapman*, 22 How. 129, where the steamer under libel was built in Louisville, Kentucky, and the persons who furnished the boilers and engines libelled in admiralty in Louisiana, the court held that there was no jurisdiction. It so held on the express ground that "a contract for building a ship or supplying engines, timber, or other materials for her construction is clearly not a maritime contract."

In that case it was insisted, for the libellants, that the local law of Kentucky, by giving a lien, supplied the defect of jurisdiction arising from the non-maritime character of the contract; but the supreme court replied that "local laws can never confer jurisdiction on the courts of the United States." In fact, it is well settled that local laws can neither enlarge nor diminish the admiralty jurisdiction, either by declaring those contracts to be maritime which are not, or those not maritime which are so by the admiralty law.

I think that the foregoing propositions settle all the claims in this case. They are all for materials, engines, machinery, work, or supplies furnished the original owners of the dredge in its original construction and equipment. As such, they come within the ruling of the supreme court in the case of *Roach v. Chapman*. The claims are not maritime, because they are for original construction and equipment. Not being maritime, the question of *home or foreign* vessel does not arise, and we have no need to examine the effect of the vessel law of New York. Not being maritime, the comprehensive law of Virginia, (chapter 235, p. 217, Acts of the Assembly, 1877-8,) giving liens and power of attachment against vessels foreign and domestic, can avail nothing in this court. In order to the existence of the admiralty jurisdiction in this court two things must concur—*First*, the claim must be maritime in its essential character; and, *second*, the lien must exist, either under the admiralty or the local law; a mere lien under a local law will not suffice of itself. I will sign a decree of dismissal as to the libel, and as to all the petitions in the nature of co-libels.

## THE BELGENLAND.\*

(Circuit Court, E. D. Pennsylvania. October 10, 1881.)

1. ADMIRALTY—COLLISION—STEAM-SHIP—FAILURE TO SEE SAILING-VESSEL—  
DUTY TO KEEP LOOKOUT ON TURTLE-BACK.

A steam-ship collided with and sunk a bark in mid-ocean in consequence of the bark not having been observed from the steam-ship in time to avoid the collision. The steam-ship had lookouts upon the bridge, but none upon the turtle-back, the reason given being that, although one could have been placed there in safety, he would have been of no use, as the vessel was plunging into a head sea and constantly taking water over her bow.

*Held*, that if the failure to see the bark resulted from the inattention of the steam-ship's lookout she was culpable, and if it resulted from the condition of the atmosphere she was culpable in not having reduced her speed and placed a lookout on the turtle-back.

*Held, further*, that, in the face of evidence that the bark held her course, and that she might have been seen from the steam-ship by proper vigilance, a mere speculative explanation of the steam-ship's presumptive culpability could not be accepted.

The decision of the district court, reported 5 FED. REP. 86, affirmed.

Appeal by the steam-ship *Belgenland* from the decree of the district court (reported in 5 FED. REP. 86) awarding damages against her upon a libel for collision. The facts are sufficiently stated in the opinion.

*Henry R. Edmunds* and *Morton P. Henry*, for libellant.

*Henry Flanders* and *J. Langdon Ward*, for appellee.

McKENNAN, C. J.:

## FINDING OF FACTS.

(1) Between 1 and 2 o'clock on the morning of September 3, 1879, in mid-ocean, a collision occurred between the Norwegian bark *Luna*, on her voyage from Humacao, in Porto Rico, to Queenstown or Falmouth, and the steam-ship *Belgenland*, on a voyage from Antwerp to Philadelphia, which resulted in the sinking of the bark, in the total loss of the vessel and the cargo, and in the drowning of five of her crew.

(2) The wind was between S. W. and W. S. W., and there was not much sea, but a heavy swell. The bark was running free, heading S. E. by E.  $\frac{1}{4}$  E., having the wind on her starboard quarter. All her square sails were set except her main royal, and she carried also her fore, main, and mizzen stay-sails and inner jib. Her yards were braced a little, her main sheet was down, but the weather clew was up. She was making about seven and one-half knots. Her watch on deck consisted of the first mate and three men; an able seaman was on the lookout on the top-gallant forecastle, and a capable helmsman was at the wheel. She carried a red light on her port side and a green light on her starboard side, properly set and burning brightly, which could be seen, on

\*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

a dark night, and with a clear atmosphere, at least two miles. The character and location of these lights conformed to the regulations of the bark's nationality, which are the same as those of the British board of trade. About 1:45 o'clock the lookout sighted the white mast-head light of a steamer right ahead, distant, as he thought, about a mile, and reported it at once to the mate, who cautioned the men at the wheel to "keep her steady and be very careful," and the bark held her course. No side lights on the steamer were seen from the bark, but, as the vessels approached each other, the white light of the steamer gradually drew a little on the port bow of the bark for three or four minutes. The mate of the bark, seeing the steamer's sails, and that she was heading directly for the bark, was close aboard of her, and reasonably apprehending that a collision was inevitable, ordered the bark's helm hard a-port. In a few seconds the steamer's starboard light came into view, and in another instant she struck the bark on her port side, cutting her in two obliquely from the after-part of the fore rigging to the fore-part of the main rigging.

(3) The Belgenland was steering N. W. by W.  $\frac{1}{2}$  W. by compass, and making about 11 knots. Her second officer had charge of the deck, and his watch was composed of 10 able seamen, two quartermasters, the second boatswain, and the fourth officer. One able seaman was stationed on the lee or starboard side of the bridge as a lookout. The second officer was on the bridge. The fourth officer was stationed at the after or standard compass, which was near the mizzen-mast, but at the time was on the bridge, having come there to report a cast of the log. A quartermaster was at the wheel. The rest of the watch were underneath the turtle-back or top-gallant forecastle. The steamer was 416 feet long and about 38 feet beam. The bridge was 150 or 180 feet from her bow, and was six or seven feet higher than the top of the turtle-back, which was about 25 feet above the water. The steamer had her fore, main, and mizzen try-sails, fore stay-sail and jib set and drawing, and probably her jigger also. She heeled to starboard from 10 to 15 degrees.

(4) The only lookout on the steamer was on the bridge. None was on the turtle-back, although it would have been entirely safe to station one there, for the alleged reason that the vessel was plunging into a head sea and taking so much water over her bows that he would have been of no use there.

(5) The bark was not seen by those in charge of the steamer until just at the instant of the collision, when the second officer saw her head-sails just across the steamer's bow; the lookout in the lee side of the bridge saw her after-sails and stern.

(6) The moon was up, but was obscured by clouds. There was no fog, but occasional rain, with mist, and the wind was blowing from the S. W. to W. S. W.

(7) Objects could be seen at the distance of from 500 yards to a mile. The mast-head light of the steamer was sighted and at once reported by the lookout on the bark, at the distance of about a mile; the port light of the bark was seen by a steerage passenger on the steamer, looking out of his room just under the bridge, and reported to his room-mates long enough before the collision to enable the second steerage steward, who heard the report, to go up the companion ladder, cross the deck, and reach the steamer's rail.

After the collision the mizzen-mast of the bark was all of her above water, and this was distinctly seen from the steamer when she was at the distance of 500 yards from it.

(8) The damages caused by the collision were assessed at \$50,248.23.

#### CONCLUSIONS OF LAW.

The following conclusions are fairly deducible from the evidence and the facts found:

(1) That the vessels were approaching each other from opposite directions, upon lines so close to each other as to involve the necessity of a deflection by one or the other of them to avoid a collision.

(2) That the lookout on the bark saw the steamer when she was nearly a mile distant, and she was held steadily on her course, and that she thereby fulfilled her legal obligation. Even if her helm was ported it was at a time and under circumstances which did not involve any culpability on her part.

(3) That it was the duty of the steamer to keep out of the way of the bark, and, to that end, so to change her course as to preclude all danger of collision.

(4) That the bark could and ought to have been seen by the steamer when they were sufficiently distant from each other to enable the steamer to give the bark enough sea-room to avert any risk of collision. In this failure to observe the bark the steamer was negligent.

(5) No satisfactory or sufficient reason is furnished by the respondent's evidence for this failure of observation. If it resulted from the inattention of the steamer's lookout, or because their vision was intercepted by her fore try-sail, she was clearly culpable. If it is explicable by the condition of the atmosphere, no matter by what cause it was produced, it was the steamer's duty to reduce her speed, and to place a lookout on her turtle-back. An omission to observe these precautions was negligence. But, considering the proof that the bark held her course, and that the steamer might have seen her by proper vigilance, when suitable precaution against collision might have been taken, a mere speculative explanation of the steamer's presumptive culpability cannot be accepted as sufficient.

I do not deem it necessary to enforce these conclusions by extended argument. The whole case is so clearly and satisfactorily treated by the learned judge of the district court that I adopt his opinion, and affirm the decree entered by him.

A decree will, therefore, be entered in this court against the respondent for \$50,248.23, with interest from March 25, 1881, and costs.

## ROBINSON, McLEOD &amp; Co. v. MEMPHIS &amp; CHARLESTON R. Co.

(Circuit Court, W. D. Tennessee, E. D. October 24, 1881.)

## 1. FRAUDULENT BILL OF LADING—COMMON CARRIER—NEGOTIABLE INSTRUMENTS—COLLATERAL SECURITY—FACTOR'S ADVANCES—INNOCENT HOLDER—ESTOPPEL—PRINCIPAL AND AGENT.

The freight agent of a railroad company, by the procurement of a cotton buyer, signed a bill of lading for 32 bales of cotton which were not on hand, and were never delivered to the railroad company or any agent for it. The plaintiffs paid a draft for the price of the cotton on the faith of the bill of lading attached to it and indorsed to them, and never having received the cotton sued the railroad company for its non-delivery. *Held*, that the carrier was not estopped to show that no cotton was in fact delivered for transportation; that the agent had no authority, real or apparent, to sign a receipt or bill of lading until actual delivery of the cotton, and the company was not liable.

## 2. SAME SUBJECT—CUSTOM—COMMERCIAL USAGE.

Neither a general nor local custom to use bills of lading as collateral security for drafts drawn against the merchandise can alter the rules of law governing the contract of the parties. This use of bills of lading is one in which the carrier has no interest, and he cannot be charged with an extraordinary liability *dehors* the contract for which he receives no compensation or indemnity, merely to assure other parties against loss by the fraudulent dealings of those who so use them. It is not in the interest of commerce to impose this liability upon the common carriers of the country.

## 3. SAME SUBJECT—PLEADING—ACTIONS—WHO MAY SUE—INDORSEE—TENNESSEE CODE, § 1967.

The indorsee of a bill of lading for value may not only sue for the goods, but he may, in his own name, sue the carrier for non-delivery. Bills of lading are *quasi* negotiable to that extent, and particularly so under the Tennessee Code, § 1967.

## On Demurrer.

Plaintiff's declaration, in its first count, claims damages for a failure to deliver in the city of New York 32 bales of cotton which the defendant corporation undertook to deliver by its bill of lading. The second count declares upon the special facts, which are stated to be that—

"The plaintiffs are and were engaged in a general cotton commercial business in the city of New York; that one J. S. Chiles was a cotton buyer residing in the city of Jackson, Tennessee; that the defendant was a common carrier by land, with an office or agency in said city of Jackson; that the means by which cotton was shipped from Jackson to the markets of the eastern cities for sale was by the advancement of money to the cotton buyer in Jackson by the plaintiffs and other merchants engaged in like business; that the usual and customary mode of obtaining such advancements was by drafts drawn by the shippers of cotton for the value of the cotton shipped; that the usual and customary mode of securing such advances was by obtaining and procuring bills of lading from the defendant and other common carriers by land for the cotton so shipped; that it was the usual and customary mode and manner of the defendant and other common carriers to execute and issue bills of lading, by

and in which it was contracted, for a reward, to deliver the cotton mentioned and described in the bills of lading to the shipper or his order, at the point of destination; that, upon the making and drawing of the drafts before mentioned, it was the usual and customary mode of inducing and obtaining the payment of money on such drafts, for the shippers of the cotton and holders of the bill of lading to indorse the same deliverable to the order of the holder of such drafts, and attach the same to the drafts so drawn, as security against loss by the holder of the drafts; that at various and sundry times before the ninth of June, 1879, the said Chiles had shipped cotton by the defendant as a common carrier from Jackson, and the defendant at such times did make and cause to be issued to him bills of lading, in manner and form as hereinbefore described; that said bills of lading so issued to said Chiles contained in writing, on their face, directions to notify the said plaintiffs of the arrival of such cotton in the city of New York; that, upon the receipt of such bills of lading so made and issued before June 9, 1879, the said Chiles drew his draft upon the plaintiffs for the value of the cotton in said bills described, and did indorse the same and attach them to the said drafts; that, upon the faith and credit of the security so given by attaching such bills of lading so made, issued, and indorsed, the said Chiles was enabled, and did, discount his said drafts, and procure and obtain the money from the local banks at Jackson; that, relying upon the said security, the plaintiffs paid the drafts on presentation; that the drafts were intended to be, and in fact were, presented long before the delivery of the cotton described in the bills of lading so attached; that the usual and customary mode of moving the cotton from Jackson, and the course of dealing between the plaintiffs and said Chiles, was well known to the defendant; that, on the seventh day of June, 1879, the defendant made and caused to be issued the bill of lading now to the court shown, to said Chiles, in and by which the defendant acknowledged the receipt of 32 bales of cotton in apparent good order, marked as described in said bill of lading, and contracted, agreed, and bound itself to deliver said 32 bales of cotton to the said Chiles or his order, in the city of New York; that the common carrier aforesaid (the defendant) would notify the plaintiffs of the arrival of the cotton in New York; that the cotton was of the average weight of 500 pounds per bale and was worth the sum of 15 cents per pound; that, on the said seventh day of June, 1879, the said Chiles drew his certain draft of that date in favor of the Bank of Madison, of said city of Jackson, addressed to the plaintiffs and payable at sight, for the sum of \$1,777.12, which said draft is now here to the court shown; that the bill of lading last above mentioned was attached to said draft, with the order of said Chiles indorsed thereon, to deliver the said cotton to N. S. White, the cashier of said bank, or his order; that the draft was, upon the faith of the security of the bill of lading aforesaid, so attached to the draft and indorsed as aforesaid, discounted by the bank, and sent to the correspondent of the bank in New York for collection; that the draft, with the bill of lading attached, and further indorsed that the cotton be delivered to the plaintiffs, was presented to them for payment, and they, relying upon and confiding in the security made by said bill of lading, and upon the faith and credit thereof, paid the same; and that the cotton, or any part thereof, has never been delivered to the plaintiffs according, etc., although, etc., to their damage, etc."

To this declaration the defendant company pleads that—

"It did not undertake," etc. "(2) The bill of lading was given, executed, and signed without any authority from the company, and the same was false and fraudulent, because the 32 bales of cotton, nor any part thereof, were never delivered or came to the hands of the defendant, or to any person authorized to receive, receipt for, or give a bill of lading, and this," etc. "(3) That the cot-



ton mentioned, nor any part thereof, was never delivered or came into the possession of defendant, or any of its agents, for transportation or for any other purpose, wherefore the bill of lading is false and fraudulent, and was issued without authority from the defendant," etc.

To these pleas the plaintiffs demur, except to the first, on which issue is joined. The grounds of demurrer are stated to be that—

"(1) The pleas are not sufficient in law," etc. "(2) They do not aver that the defendant did not contract and agree to deliver," etc., "as alleged in the declaration. (3) They do not aver that the defendants did not make, execute, and issue the bill of lading. (4) They do not show such a state of facts as will prevent a recovery. The facts averred in the declaration estop the defendants from denying the actual receipt of the cotton," etc.

*Freeman & McCorry* and *Muse & Buford*, (of Jackson, Tenn.,) for plaintiffs.

*Campbell & Jackson*, (of Jackson, Tenn.,) for defendant.

HAMMOND, D. J. No technical objections have been raised as to the form of any of the pleadings in this case, nor has the case been strictly argued on the facts as they appear by the pleadings. The difficulty is that the second and third pleas are not special pleas, stating the particular facts, and amount to no more than the general denial of the first, on which issue has been joined. Of course, if the bill of lading "was given, executed, and signed without authority from this defendant," and the demurrer admits this, there can be no recovery in any view of the case; but the allegation amounts to no more than that of the first plea, that the company "did not contract, undertake," etc. Nor is the statement contained in these pleas, that the cotton was never delivered to the company, anything more than this general denial of the first plea; for neither of the pleas admits the bill of lading to have been signed by an agent of the company who would have been authorized to sign it if the cotton had been delivered, although that important fact has been assumed in the argument. The allegation of these pleas, that the bill of lading was "false and fraudulent," is a mere conclusion of law, based upon the other allegations that it was issued without authority, and that no cotton was delivered for transportation. The court understands from counsel on both sides that there was an agent of the defendant company at Jackson authorized to sign bills of lading when cotton was actually delivered to him, or the company's other agents, for transportation,—the defendant contending that this was a special agency arising only on actual delivery of cotton, while the plaintiff treats him as a general agent of the largest powers; that this man Chiles, either by collusion with this agent or by false representations to him, procured him to sign the bill of lading in controversy without any act-

ual delivery of the cotton, attached it to the draft as stated in the declaration, negotiated them as alleged, but never delivered any cotton to the company. This is the case that has been argued, but it is readily seen that it is not precisely the one presented by the record. Inasmuch, however, as counsel have treated these pleas as if the facts stated to the court were contained in them, and seem desirous of taking the judgment of the court on those admitted facts, I shall so treat the case, but will require a special plea to be added, stating the facts something in the form indicated, and reserve the right, if I have mistaken them, to reconsider the case on those to be stated in the plea, or to render the judgment demanded by the record as it now stands.

It will be seen, from this statement of the facts and those contained in the pleadings, that the question is whether or not a common carrier is liable for damages sustained by the indorsee of a bill of lading, issued by its agent, binding it to deliver merchandise never in fact delivered to the carrier for transportation, where there is an allegation of special damage sustained by reason of the fact that the indorsee has advanced money on the faith of a receipt of the goods by the carrier, as expressed in the bill of lading. That the plaintiffs believed this cotton was in the hands of the carrier, as certified by its agent, under a contract to deliver it to the order of Chiles, there can be no doubt. I cannot see that it is material whether this agent trustingly confided in the misrepresentations or promises of Chiles, or whether he fraudulently conspired with him to do the wrong. The question is, who shall suffer the loss, the railroad company or the plaintiffs? If I may use the language of Mr. Justice Field:

"The question involved is one so often unfortunately raised in courts of justice as to which of two innocent parties is to suffer by the dishonest dealing of a third, and the only course open to a court in such case is to ascertain upon which of the parties the loss is cast by the operation of the rules of law applicable to the case, and decide accordingly. In this action the question is one of considerable mercantile importance, and I have taken time to consider the authorities applicable to it, but the legal result of the facts has always seemed and now seems to me plain." *Glyn v. E. & W. India Dock Co.* 5 Q. B. D. 129, 132.

But, notwithstanding this seeming confidence, the judgment of that learned court was, as the one I am about to give may be, reversed on writ of error, and the case is, though not precisely like this, very instructive here. The shipper and consignee received from the master three bills of lading,—or rather one bill of lading in three parts, as is sometimes customary,—marked

"first," "second," and "third." The first he indorsed to the plaintiffs for advances made, and afterwards, the goods being entered at a warehouse in the shipper's name, he dishonestly gave orders to other persons for the goods, assigning the "second" part of the bill of lading, upon which the goods were delivered. The plaintiffs sued the warehouseman, and the queen's bench division gave judgment for the value of the goods. That court calls attention to the fact that the carrier would not have been liable, though the concession is somewhat reluctantly made, because he was not bound to settle conflicting claims, and might deliver the goods to an apparent owner holding either part of the bill of lading. I have not seen the report of the judgment of the court of appeal reversing the queen's bench division, but it must have been on the ground that the warehouseman was equally protected with the carrier. 15 Am. Law Rev. (N. S.) 156. I cite the case to show that while the law holds a carrier to a very rigid and often harsh degree of liability for the performance of his contract *qua* carrier, it does not readily impose any outside liability or embarrassment upon him. And this is in the interest of commerce, and in pursuance of that public policy which encourages the unembarrassed transportation of goods by common carriers. Their business is that of transportation, and they are not engaged in issuing bills of lading as negotiable securities, to be used as such for the convenience of bankers, brokers, and commercial men. A bill of lading is issued primarily as an evidence of their executory contract to carry, and the acknowledgement of the receipt of the goods for that purpose is only incidental,—the mere averment of a fact for the purpose of founding thereon the contract to carry. Now, commercial men have, from time immemorial, for their own advantage, and not at all for that of the carrier, let it be remembered, treated these documents as convenient symbols or muniments of title, and as instruments of transfer of title, and they have, for that purpose, acquired among them a *quasi* negotiability or capacity to pass from hand to hand by indorsement. But the carrier is not at all benefited by this, and it is not for his gain that it is done. Mr. Justice Clifford defines a bill of lading thus: "Such an instrument acknowledges the bailment of the goods, and is evidence of a contract for the safe custody, due transport, and right delivery of the same, upon the terms as to freight therein described, the extent of the obligation being specified in the instrument." *The Delaware*, 14 Wall. 579, 596.

It seems to me, with all deference, that it is a misapprehension of

the true character of this instrument, and of the true relation of the parties to it, to treat it as if the maker were engaged in the business of issuing negotiable securities, which he is bound to protect at all hazards in the hands of a *bona fide* purchaser for value; or, as it is expressed in argument here, to protect those who innocently and in good faith deal with it. This entails a liability *dehors* the contract. It makes the carrier an insurer or guarantor of strangers to the contract against loss incurred by a use of the instrument in which the carrier has no interest, and binds him to a liability for which he is not paid; for the comparatively small sum he receives as compensation for carriage will not, and is never intended to, cover or insure him against loss incurred by such a liability as that. The consideration he receives is not commensurate with the liability sought to be imposed, and if it is determined to exist carriers must necessarily add to the freight a sum sufficient to indemnify them, as insurance companies are; and this for the protection of outside parties dealing in matters not pertaining to the carriage of the goods. Moreover, it obstructs the carrier in his proper business, and entails upon him the selection of agents possessing not only the ordinary mental and moral qualifications essential to the receiving, handling, and carriage of merchandise, but those having the relatively higher qualifications required of bank cashiers or other agents entrusted with the duty of issuing, signing, and handling bank notes, negotiable bonds, or like securities. It does not seem to me in the interest of commerce to compel carriers either to so increase the rates of compensation or to confine them to the selection of agents as banks and trust companies are confined.

And these considerations cannot be overlooked or overborne by the supposed benefits of having the commercial world supplied with an assurance against inconvenience in their dealings, not with the carrier, but each other. To illustrate by this case, it is plain that the Bank of Madison, when it discounted the draft and took the bill of lading, could have known, being in the same town, by sending a messenger to the agent, depot, or warehouse of the company, that this was a false bill of lading. So, although these plaintiffs in New York could not so readily have ascertained that fact, they could have protected themselves by refusing to accept the drafts until the cotton had arrived, or until by telegraph they had assured themselves of the existence of the cotton. 16 Am. Law Reg. (N. S.) 1. They both, no doubt, trusted more to the ordinary honesty of human nature and the particular honesty of Chiles, than they did to this bill of lading, or

at least as much; and, at all events, the person who signed the bill of lading trusted to that honesty, if he was not *particeps criminis*, and I do not see why one should lose more by the trust than the other. And in this connection it must be remembered that Chiles was the plaintiffs' regular customer. *Hoffman v. The Bank, etc.*, 12 Wall. 181, at p. 190. Certainly, in my judgment, an extraordinary liability so beyond the scope of the actual contract of the carrier, and beyond the general business he is engaged in, should not be imposed to save a bank from the inconvenience of sending a messenger a few squares in the same town, or yet to expedite by a few days or moments the dealings between a cotton factor and his customer, upon any theory that it is in the interest of commerce to do this. A factor must attend to the honesty of his customer, and so a bank; and they should know that a common carrier is confined to the business of carrying goods actually delivered, has no liability till they are delivered, and that delivery and not the signing of the bill of lading is the initial point of the contract and the liability.

Mr. Justice Willes said, in a case involving a fraudulent dealing with a bill of lading, that—

"Arguments founded upon the notion that the court is to pronounce a judgment in this case which will protect those who deal with fraudulent people are altogether beside the facts of this case and foreign from transactions of this nature. To attempt such a task would be idle; to accomplish it, impossible. We must apply our minds to the facts of the case before us, and see what is their true bearing, and what is the proper conclusion we ought to arrive at in respect to the litigant parties, without considering what may hereafter happen to persons who omit to use diligence and consequently to have the misfortune to be overreached."

And this was emphasized, when the case went to the house of lords, by Lord Chancellor Hatherley, in language I forbear to quote, only because it requires space to present it properly. *Meyerstein v. Barber*, 2 C. P. 38, 51; S. C. 4 H. L. 317, 332. The holder of the first two parts of a bill of lading, who had made advances on it, sued, in that case, the holder of the third part, who had in good faith, relying on the bill of lading, purchased the goods, and recovered their value, notwithstanding the argument just alluded to, which is the same suggested by the averments of the declaration and pressed in argument here. The principle established is that because others may deal fraudulently with bills of lading furnishes no ground for the court, in the supposed interest of commerce, to disregard the ordinary rules governing the contract of the parties in order to protect those who

carelessly neglect to take the precautions that would protect themselves.

The rule contended for would make bills of lading in this respect negotiable, like bills of exchange or other representations of money, which they are not. 2 Daniell, Neg. Inst. (2d Ed.) §§ 1727, 1751. Mr. Justice Strong puts this claim for them at rest when he says:

"The function of that instrument is entirely different from a bill or note. It is not a representation of money used for transmission of money, or for the payment of debts, or for purchases. It does not pass from hand to hand, as bank notes or coin. It is a contract for the performance of a duty. True, it is a symbol of ownership of the goods covered by it—a representation of those goods. \* \* \* Bills of lading are regarded as so much cotton, grain, iron or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable in the same manner as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them in all respects on the footing of instruments which are the representations of money, and charged the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange, if not impossible, such as the liability of indorsers, the duty of demand *ad diem*, notice of non-delivery by the carrier, etc., or the loss of the owner's property by the fraudulent assignment of a thief." *Shaw v. Railroad Co.* 101 U. S. 557, 564.

If a statute like that described by the learned justice does not so result, how can a careless belief of the plaintiffs in this case, that this bill of lading was what it purported to be, have the effect of subjecting the carrier to the same liability as if it had issued a bill of exchange or promissory note without receiving the consideration for it? Or the same result as if an agent, authorized to sign its notes, had executed and negotiated one on his own account to defraud the principal? *Lowell Bank v. Winchester*, 8 Allen, 109.

Nor do I see why the local or special custom averred in this declaration, or any general custom of dealing with bills of lading as if they possessed this element of negotiability, should give it to them as against the carrier, or enlarge his liability on them. Whart. Ag. §§ 134, 675, 676; *The Reeside*, 2 Sumn. 567, 569; *Turney v. Wilson*, 7 Yerg. 340; 6 So. Law Rev. (N. S.) 845; *The Delaware*, 14 Wall. at pp. 602, 603; *Blakemore v. Heyman*, 6 FED. REP. 581.

The most plausible argument in favor of the plaintiffs is that the carrier, having authorized an agent to sign bills of lading, is estopped

to deny the receipt of the cotton when the bill of lading has passed into the hands of an innocent party, and should be held precisely as if it had received the cotton and failed to deliver it to the plaintiffs. I doubt whether a factor and his principal occupy such a relation to each other in their dealings as will justify either in saying of their common or mutual carrier that he is the carrier for the other, so as to take the case out of the category of one between the original parties where there is not the least doubt that the carrier is not estopped to explain his receipt by showing it to be a false one or only partially a true one. *The Lady Franklin*, 8 Wall. 325. But, passing that question, there can be no doubt that one should not be estopped by the conduct of another, unless that other is acting for him in the premises. *Big Estop.* 442; *Id.* 429; *Whart. Ag.* 127-139; 13 *Am. Law Reg. (N. S.)* 657; *Planters' Bank v. Merritt*, 7 *Heisk.* 177; *Merchants' Bank v. State Bank*, 10 Wall. at p. 675. It is sometimes said that the principal is estopped where the agent acts within the *apparent* scope of his authority, and this may be conceded here. But this railroad company did not authorize this agent to sign false or fictitious bills of lading. It said to the community: We are engaged in carrying merchandise to New York or elsewhere, over our lines, and we place this man here to receive such as you have for transportation, and authorize him to give you a receipt for it and a written contract stipulating for its transportation. They did no more than this, and no more can be fairly inferred from what they did. It was not within the apparent scope of this authority to sign and issue documents for the mere purpose of having them attached to drafts or otherwise pledged as collateral security, irrespective of the actual possession of goods to be carried. It may well be doubted whether the directory itself, or the body of the stockholders even, could authorize the company to issue bills of lading without the merchandise in hand to be used for any purpose. The charter does not authorize such a business, and the company is not engaged in it. Therefore, it seems to me plain that the agent's authority, actual and apparent, was limited to issuing bills of lading on goods in hand, and all else was outside the agency, unless we are to treat these documents as against the carrier just as if they were as negotiable in this respect as bills and notes, which we have seen we are not authorized to do. Indeed, a bill of lading is not necessary at all, and the carrier's liability is fixed by delivery of the goods without it. *Fox v. Hall*, 36 *Conn.* 558; *S. C.* 4 *Ben.* 278; *Shelton v. Merchants' Co.* 4 *J. & S. (N. Y.)* 527; *Hutch. Car.* §§ 118,

729. A general railroad agent may sometimes bind the company within the general scope of its own powers, but not a mere station agent, freight receiver, or conductor. *Atlantic, etc., Railroad v. Reiser*, 18 Kan. 458; Whart. Ag. § 222; Id. §§ 57-59, 129, 172, 478, 670, 671, 677; Story, Ag. § 69; *Cox v. Midland R. Co.* 3 Exch. (Wils., Hurl. & Gord.) 268.

The case of *Farmers', etc., Nat. Bank v. Erie R. Co.* 72 N. Y. 188, illustrates the class of acts within the scope of the authority of this kind of agent, and shows where the corporation is liable for their neglect. It was a bill of lading issued to the wrong person on goods received, and the carrier was liable to the rightful owner notwithstanding it delivered to this fraudulent consignee. Of course, the company did not authorize an agent to issue to a wrong person, but having received the goods of the rightful owner its liability was fixed, and the agent was neglectful within the scope of his authority over the goods. It was his business to deliver to the rightful owner, and it was negligence to deliver to another. Signing the bill of lading to the wrong person was only an incident of that neglect. Another illustration is found in *Bradstreet v. Heran*, 2 Blatchf. 116, where a master signed a bill of lading, representing that the goods shipped were in good order; and another in *Relyea v. Rolling Mill Co.* 42 Conn. 579, where the bill of lading represented that there was a larger quantity than was actually shipped, and libels to recover freight were dismissed. But see *Blanchet v. Powell*, 9 Exch. 74. But there being no goods delivered to the carrier, no agency to sign a bill of lading is called into being; indeed, there is no carrier, for there are no goods to be carried. There is a ship or a railroad, but it is not, as to any given person, a carrier without the goods, and it only as carrier that a bill of lading, in the nature of the thing, binds the company or owner.

The master of a ship has a more comprehensive agency than a station or freight agent of a railroad, and he has no authority, actual or apparent, to issue bills of lading until the goods are delivered to him or to the ship, and it took a statute in England to make him even personally liable to one injured by such bill of lading. 3 Kent, (12th Ed.) 207, and note; 1 Pars. Mar. Law, (Ed. 1859,) 135, 137, and notes; 1 Pars. Ship. & Ad. (Ed. 1869,) 187, 190, and notes; 2 Daniell, Neg. Inst. (2d Ed.) §§ 1729, 1733; 1 Chit. Cont. (11th Ed.) 7, note c; Hutch. Car. §§ 122, 123, 124; 2 Jac. Fish. Dig. 1654, and cases cited by these authorities; 18 & 19 Vict. c. 111, § 3; *Jessel*



v. *Bath*, 2 Exch. 267; *Brown v. Powell Col. Co.* 10 C. P. 562; *Grant v. Norway*, 10 C. B. 665; 70 Eng. Com. Law, 664.

These authorities establish beyond dispute that where a master signs a bill of lading for goods not received, or for more than are received, he acts beyond his authority, and the owner is not liable either to the original shipper or any assignee of the bill of lading, whether he makes advances on the faith of it or gives value for it or not; neither is the owner estopped to show the facts as they really exist. Some courts have reluctantly yielded to this principle, and some have sought to restrict or qualify it in the supposed interest of commercial dealing; but in England, although a statute makes the individual signing the bill of lading liable, it goes no further, and the doctrine of *Grant v. Norway*, *supra*, has withstood the assaults upon it and is established law. It has been approved by the supreme court of the United States, and directly or in principle by other federal courts. *Schooner Freeman v. Buckingham*, 18 How. 182; *Vandewater v. Mills*, 19 How. 90; *The Lady Franklin*, 8 Wall. 325; *The Keokuk*, 9 Wall. 517, 519; *Buckley v. Naumkeag Co.* 24 How. 386, 392; S. C. 1 Cliff. 322, 328; *The Loon*, 7 Blatchf. 244; *The Grant*, 1 Biss. 193; *The May Flower*, 3 Ware, 300; *The Edwin*, 1 Sprague, 477; *The Leonidas*, 1 Olc. 12; *The Marengo*, 6 McLean, 487; *McCready v. Holmes*, 6 Am. Law Reg. (O. S.) 229; *The Brown*, 1 Biss. 76; *The Wellington*, Id. 279, 280; *The Tuskar*, 1 Sprague, 71; *Sutton v. Kettle*, Id. 309; *Blag v. Ins. Co.* 3 Wash. 5; *Dixon v. Railroad Co.* 4 Biss. 137, and note at page 147; *Bradstreet v. Heran*, 2 Blatchf. 116; *Relyea v. Rolling Mill Co.* 42 Conn. 579.

It must be conceded, as is contended here, that none of these cases were against railroad companies—the case of *Dixon v. Railroad Co.*, *supra*, being cited only for the note as a collection of authorities; and in the *Lady Franklin*, *supra*, *Relyea v. Rolling Mill Co.*, *supra*, *Bradstreet v. Heran*, *supra*, there are intimations, and in two of them something more than intimations, perhaps, that the rule might be different where the case is embarrassed by advances being made on the faith of the bill of lading. But it is thoroughly settled that there is no distinction between a bill of lading given by a carrier on land and one given by a carrier on water. Mr. Justice Story says as much, and that “each means the same obligation and liabilities, and is subject to the same duties.” *King v. Shepherd*, 3 Story, 349, 360. The learned annotators of *Lukbarrow v. Mason*, 2 T. R. 63, (S. C. 6 East, 21,) say:

"It has, indeed, been questioned whether a receipt given by a carrier for goods or merchandise placed in his hands for transportation from one part of the same country to another, along the line of a canal or railroad, is a bill of lading in the sense of the commercial law, or within the rule of *Lickbarrow v. Mason*. But this doubt has but little foundation in reason, and is impliedly excluded by the decisions in this country, which treat the legal effect of instruments of this description as the same, whether the property which they represent is carried by land or across the ocean." 1 Smith, Lead. Cas. (7th Ed.) 1205, marg. p. 900. See, also, 2 Daniell, Neg. Inst. (2d Ed.) § 1732; 1 Parsons, Ship. & Adm. 134; Bouv. Law Dict. tit. "Bill of Lading," and cases cited.

The argument of learned counsel for the plaintiffs, that this exemption of the owner of a ship from liability for the fraud of the master in issuing a false bill of lading grows out of the peculiarities of the laws of the sea, and is founded on the principle that the ship is bound to the freight and the freight to the ship, is a misapprehension, I think, of the meaning of the supreme court in *The Schooner Freeman Case*, for the court distinctly places its judgment as well upon the want of authority in the master as an agent. See *The Williams*, 1 Brown, Adm. at p. 219; *The Pauline*, 1 Biss. 390.

And in respect to the intimations that there is a different rule between an assignee who has in good faith advanced money on the faith of the bill of lading and the original parties, I can only say that, in my judgment, no such distinction exists. These intimations are all founded on doubts and conflicts that were set at rest by *Grant v. Norway*, which is a direct authority against them. *The Schooner Freeman Case* approves that of *Grant v. Norway*, was itself a case of advancement of money on the faith of a false bill of lading, and must bind us here, both in its principle and its precedent. Besides, I have no doubt, for the reasons I have stated, that it is the correct principle, and it is a mistake to suppose that the interests of commerce require that the common carriers of the country shall become the insurers or guarantors of merchants who choose to make, in their dealings with each other, a convenience of their bills of lading.

It is proper that I should give attention to the conflict of authority in the state courts, though in this matter of general commercial law I should feel at liberty to act independently, without attempting to reconcile the conflict, and follow the guidance that seems to me plainly pointed out by the federal adjudications I have consulted. The New York commission of appeals has deliberately overruled both the courts of England and the supreme court of the United States, though the lamented author of *Hutchinson on Carriers* seems

to distinguish the case, and the court itself somewhat relies upon the distinction; and the responsibility for any want of uniformity on the subject must rest on that court. *Armour v. Mich. Cent. R.* 65 N. Y. 111; *Hutch. Car.* § 124. The supreme court of Kansas adopts this view of the New York court in the case of *Savings Bank v. Railroad*, 20 Kans. 519. On the other hand, the supreme courts of Maryland, Louisiana, Missouri, Massachusetts, and Ohio sustain *Grant v. Norway* and *The Schooner Freeman Case* in opinions that are instructive and conclusive to my mind. There may be other cases on both sides, but these are sufficient for the present purpose. I find no Tennessee case on the subject, and it is proper to say that the decision in Maryland to which I refer inspired a statute since passed to make bills of lading negotiable, the effect of which upon the principle we are considering has not been determined. *Balt. & Ohio R. v. Wilkins*, 44 Md. 11; *Tiedman v. Knox*, 53 Md. 612, 615; *Fellows v. Powell*, 16 La. Ann. 316; *Adams v. Trent*, 19 La. Ann. 262; *Hunt v. Miss. Cent. R.* 29 La. Ann. 446; *La. Nat. Bank v. Lavielle*, 52 Mo. 380; *Dean v. King*, 22 Ohio St. 118; *Sears v. Wingate*, 3 Allen, 103; 1 Meigs' Dig. (Tenn. 2d Ed.) p. 384, § 396; *Id.* p. 411, § 420, subs. 3.

The Massachusetts case formulates the rules of law on this subject, the third of which says:

"When the master is acting within the limits of his authority the owners are estopped in like manner with him; but it is not within the general scope of the master's authority to sign bills of lading for any goods not actually received on board."

A question is made by the defendant that the plaintiffs cannot sue in their own name because it is contended that the assignment of a bill of lading goes no further than to give the assignee a right to bring replevin or trover for the goods or some action connected with his ownership, and does not assign the right to bring an action for a breach of the contract of affreightment. This was never so in our admiralty courts, though for a long time such was the contention in courts of law. But now, as the authorities already cited and numerous others show, the assignment carries the right to bring an action against the carrier for loss or non-delivery. This would be certainly so under the influence of our Code, which makes all bills for the performance of any duty assignable, and our decisions collected in Meigs' Digest at the places above cited. *T. & S. (Tenn.) Code*, § 1967; *The Thames*, 14 Wall. 98; *S. C. 3 Ben.* 279; 7 *Blatchf.* 226; *The Vaughan and Telegraph*, 14 Wall. 258; *Curry v. Roulstone*, 2 Tenn.

110; *Newcomb v. Boston, etc.*, R. 115 Mass. 230; *Merchants' Bank v. U. R. Co.* 69 N. Y. 373; 1 Am. Lead. Cas. (4th Ed.) 323; 1 Smith, Lead. Cas. (7th Ed.) 816; Id. 1147, 1227; Hutch. Car. §§ 720, 737; 2 Daniell, Neg. Inst. c. 54.

Demurrer overruled.

NOTE. The writer of this opinion cannot resist an impulse of affectionate remembrance, and begs the privilege of adding here a word of admiration for the thorough, careful, and able work of his deceased friend, Robert Hutchinson, the author of the treatise on "Carriers," above referred to, who died in the great plague of yellow fever that desolated Memphis in 1878. Often—very often—while he was engaged in the preparation of that book, have we labored together in the late hours of the night in the library where the writer at this moment works alone beside the silent but enduring monument his dead friend has left.

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ALABAMA GOLD LIFE INS. CO. v. GIRARDY.

(Circuit Court, D. Louisiana. 1881.)

1. STATE COURT—PROCESS.

A state court cannot reach funds which have been made by an officer of a federal court on execution.

Rule on marshal to pay over moneys collected on execution.

PARDEE, C. J. In this case the marshal, on execution, has made the sum of \$1,880.16 for the plaintiffs. To a rule directing him to pay over or show cause, he answers that the funds in his hands have been attached under process from the civil district court of the parish of Orleans, in a suit brought by *W. H. Finnegan v. The Alabama Gold Life Ins. Co.* The answer is not sufficient. The funds are in the custody of this court, and are not subject to the control or process of the state court. See case of *Ellis v. Wooldridge*, 2 Wood, 667.

The only doubt I have about making the rule absolute is whether, as a matter of comity, this court should not wait until the attachment is discharged in the state court, as it undoubtedly will be on suggestion of the facts, before disposing of the proceeds in the hands of the marshal.

But considering the absolute illegality of the pretended seizure, and that a delay may be taken as waiving the undoubted jurisdiction of this court in the premises, and repudiating any desire or intention of forestalling the action of the state court or of prejudicing its jurisdiction, I deem it my duty to make the rule absolute; and it is so ordered.

## UNITED STATES v. VOORHEES.

*(Circuit Court, D. New Jersey. 1881.)*

## 1. NATIONAL BANK—INTENT TO DEFRAUD—STATUTES—CONSTRUCTION—PUNCTUATION.

Under section 5209 of the Revised Statutes of the United States, an intent to defraud the association, or other company or person, is an essential element of the crime in every case. The words, "with intent in either case to injure or defraud," etc., apply as well to embezzlement, etc., of the funds, as to the making false entries in the books.

The punctuation of a statute is not made to be relied on, and must be disregarded if it requires a construction which is repugnant to a sense of justice.

This was a motion to quash the indictment found against the defendant, as president of the First National Bank of Hackensack, under section 5209 of the Revised Statutes. The first count charges that the defendant did embezzle, abstract, and wilfully misapply certain funds and credits of the bank of the value of \$5,000.

The second is in the same form, except that it specifies the particular stocks abstracted. Neither count alleges any intent.

It was moved to quash the first count because it was too general in its terms, and both counts because no intent is alleged. The section is as follows:

"Sec. 5209. Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement to the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section,—shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

*Joseph D. Bedle*, for the motion.

*A. Q. Keasbey*, U. S. Atty., *contra*.

MCKENNAN, C. J., announced the opinion of the court. He said that as to the first count the object of more specific allegations was to give the defendant full and fair information as to the charge, and to be a bar against another prosecution. It has been usual in this district to hold indictments like this, in the words of the statute, to

be good, and the object of more definite statements can always be reached by an order for a bill of particulars. As to the second count, it is not subject to this objection, but specifies the funds abstracted. These objections must, therefore, be overruled. The other objection applies to both counts. It relates to the want of allegation of intent.

It is urged that the punctuation of the statute shows that as to the first three offences stated, of which the charge in the indictment is one, the intent referred to in the section was not applied, but that it applies only to the last offence of false entries in any book, report or statement. Congress may provide that acts of this character may be punished without allegation or proof of criminal intent, and if such provision is clear the courts must enforce them; but if the provision is repugnant to the sense of justice, and the offence is made very highly penal, as in this case, courts are disposed to give effect to any fair doubt as to the intention.

If it were not for the punctuation, on which the district attorney has laid so much stress, there would be no doubt that the intent mentioned would apply to all the offences mentioned; but in a criminal case, where much is to be allowed in favor of liberty, it is unsafe to rely on a mere matter of punctuation. If these offences were separated only by commas there would be no doubt that the intent with which the section closes would apply to all its divisions. But we think that, as it stands, the fair construction of the act, and the latter part of the section which provides that any one who aids or abets an officer in doing any of the acts with like intent shall be similarly punished, must be to make it necessary to allege and prove the intent as to all. It cannot be supposed that the legislature intended to require more proof against the abettor than was required against the principal; and this part of the statute makes it necessary to construe the preceding part in such a way as to apply the intent to all of the offences, notwithstanding the punctuation of the sentences. Upon these grounds the indictment must be quashed.

Judge Nixon concurred in the result, and said that while the statute would bear both constructions, yet, in a criminal case, where a minimum penalty of five years is inflicted, the most lenient and merciful construction should be adopted.—[*New Jersey Law Journal*.

## FISCHER v. DAUDISTAL.\*

*(Circuit Court, E. D. Pennsylvania. April 16, 1881.)*

## 1. FOREIGN ATTACHMENT—COLLECTOR OF CUSTOMS—GOODS HELD FOR DUTIES.

A United States collector of customs cannot, in a foreign attachment proceeding in a state court, be made garnishee with respect to goods of the defendant held for duties; and if he is served with a writ of attachment in such proceeding the service will be set aside.

## 2. REMOVAL OF CAUSES—COLLECTOR OF CUSTOMS SERVED WITH ATTACHMENT.

The collector may, if served with such attachment, remove the suit to the United States circuit court, under section 643 of the Revised Statutes.

Motion to remand case to state court, and motion to quash writ of foreign attachment:

This was a suit of foreign attachment brought in a state court by Frederick Fischer against Philip Daudistal. By an indorsement on the writ the sheriff was directed to attach the goods and chattels of defendant in the possession of the Red Star Line, (Peter Wright & Sons, agents,) the Pennsylvania Railroad Company, and John F. Hartranft, collector of the port of Philadelphia. The sheriff returned that he had attached as commanded and summoned as garnishees the Red Star Line, the Pennsylvania Railroad Company, and John F. Hartranft, collector of the port of Philadelphia. Subsequently, in the same suit, the plaintiff filed a petition setting forth that under the writ of foreign attachment the sheriff had seized, on the wharf of the Red Star Line, 14 casks of wine imported from Europe by, and consigned to, the defendant, subject to claims for duties payable to the United States; that the customs officers had taken possession of the wine and stored it in the bonded warehouse; that plaintiff, as attaching creditor, had tendered to John F. Hartranft, collector of the port of Philadelphia, the duties payable on said wine, and had requested him to receive the same and deliver up the goods to the sheriff, but that he refused so to do. Plaintiff prayed for a rule on the collector to show cause why he should not receive the duties and surrender the goods into the custody of the court. A rule having been granted in accordance with this prayer, John F. Hartranft, the collector, obtained a *certiorari* from the United States circuit court to remove the record to that court. The record was duly certified, whereupon plaintiff moved to remand, and the collector moved to quash the writ of attachment as to him.

These motions were argued before McKENNAN, C. J., and BUTLER, D. J.

Lewin W. Barringer, for plaintiff.

This suit is not brought against the collector, and he is not a party defendant. As garnishee he is only collaterally interested, and cannot remove the suit. Part of a controversy only cannot be removed. *Hervey v. Railroad Co.* 7 Biss. 103. The title to the property was in the consignee, and the pri-

\*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

ority of the United States is only a "priority of payment, but not of possession." It is in the nature of a lien or mortgage for the payment of the duties. *Conard v. Atlantic Ins. Co.* 1 Pet. 441; *Tracy v. Swartwout*, 10 Pet. 95; *U. S. v. Lyman*, 1 Mason, 499; *Howland v. Harris*, 4 Mason, 497. The custody of the collector is superseded and discharged when the property is seized under legal process. *U. S. v. Cuse of Silk*, 13 Int. Rev. Rec. 58. The case of *Harris v. Dennie*, 3 Pet. 292, relied on by the collector, has been overruled in *Conard v. Pacific Ins. Co.* 6 Pet. 271. The property being in the custody of the court it had power to make the order asked for. *Buch v. Colbath*, 3 Wall. 341. The duties having been tendered to the collector he has no longer any right to interfere.

*John K. Valentine*, U. S. Dist. Atty., for the collector.

This proceeding being against an officer acting under a revenue law, on account of a right claimed by him, is within section 643, Rev. St. A foreign attachment is a suit within the statute. *Taylor v. Carryl*, 20 How. 597; *Weston v. City Council of Charleston*, 2 Pet. 464. In this case an attempt is made to compel the collector to accept the duties—an act which he could not be compelled to do by *mandamus*. *Kendall v. U. S.* 12 Pet. 526; *McClung v. Silliman*, 6 Wheat. 598; *Same v. Same*, 2 Wheat. 369; *McIntire v. Wood*, 7 Cranch, 504; *Marbury v. Madison*, 1 Cranch, 137. Attachments issued out of a state court do not affect the rights of the United States to hold the merchandise until the payment of duties. *Harris v. Dennie*, 3 Pet. 292. This case was not overruled by *Conard v. Pacific Ins. Co.* 6 Pet. 262. Judge Story delivered the opinion of the supreme court in both cases, and in the latter case Judge Baldwin, in the court below, expressly distinguished them. The doctrine of *Harris v. Dennie* was reaffirmed in *Taylor v. Carryl*, 20 How. 594. See, also, *U. S. v. Lyman*, 1 Mason, 482.

The court filed a decree refusing the motion to remand, and setting aside the service of the writ as to John F. Hartranft, the collector. No opinion was filed.

### *In re YOUNG.*

(Circuit Court, N. D. Illinois. November 3, 1881.)

#### 1. BANKRUPTCY—APPLICATION FOR A DISCHARGE—WHEN SEASONABLE.

The application of a bankrupt for a discharge is seasonable if made before the final disposition of the case.

#### 2. CASE STATED.

Order denying a bankrupt his discharge for want of timely application reversed, where the application was made before a final order closing the case, though after an order permitting a creditor to move for a final order.

*James Coleman*, for bankrupt.

*John W. Ranstead*, contra.



DRUMMOND, C. J. The bankrupt in this case was adjudged a bankrupt in 1878. On the sixth of September, 1880, no application for a discharge having been made to the district court by him, that court made an order that all bankrupts who should not take the necessary steps to have the question of their right to a discharge ready to be determined on or before the first Monday in December following, would be deemed to have unreasonably delayed in endeavoring to obtain a discharge, and it was declared that any creditor or other person interested in the bankrupt's estate might, without notice, move for a final order closing the case and denying the discharge for want of timely application therefor. The bankrupt had notice of this order, but the counsel who had attended to his case being sick, he states that he was informed and believed, on that account, no steps would be taken to prejudice his right to make the application for discharge.

On the the fifteenth of December the bankrupt caused an application in due form to be made for his discharge and presented to the clerk of the district court, who refused to receive it, because of the order of the court of the sixth of September. On the third of January, 1881, the matter was brought to the notice of the district court by a petition in due form alleging these facts, and on the same day a creditor of the bankrupt, who had previously proved his debt against the estate, made an application to the court for a final order closing the case and denying a discharge to the bankrupt, and the court thereupon granted the application of the creditor, and denied the bankrupt his discharge for want of a timely application for a discharge.

It is this order of the district court which the bankrupt asks to have reversed, and that the district court should grant his discharge, and the only question in the case is whether he should have been permitted to apply for a discharge under the facts stated. There can be no doubt it was entirely competent for the district court to make the order of September 6, 1880. Proceedings were pending in many cases without any application having been made for the discharge of the bankrupts respectively, and it was quite proper that some action should be taken by the court in order to finally close all these various proceedings. The only question is whether the court could refuse the application before the case was finally closed by some action which had that effect. The law upon this subject, as it was modified by the amendment of July 26, 1876, is as follows:

"At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come into the hands of the assignee at any time after the expiration of 60 days, *and before the final disposition of the cause*, the bankrupt may apply to the court for a discharge from his debts. This section shall apply in all cases heretofore or hereafter commenced."

If there had been an order of the district court made, as contemplated by that of the sixth of September, 1880, finally closing the case, before the application was made by the bankrupt for a discharge on the fifteenth of December, there could have been no doubt that it would have been too late; but, in fact, no action was taken by the court, finally closing the case, until after the application for a discharge was made to the clerk of the court.

On the third of January, 1881, the bankrupt called the attention of the court to the fact that he had made his application on the fifteenth of December, 1880. He ought not to be prejudiced by the refusal of the clerk then to receive and file the petition for a discharge. At that time, the case had not been finally disposed of, and it was not until the third of January, 1881. I adhere to the ruling made in the case of *In re Forsyth*, Chi. Leg. News, Dec. 11, 1880, "that in order to deprive the bankrupt of the right to make his application for a discharge there should be some action of the court to the effect that the case had been finally disposed of." So that, I think, the true construction of the order of the district court of the sixth of September, 1880, when considered in connection with the act of congress upon this subject, already referred to, must be that, until the final disposition of the cause by some action of the court, the effect of which is to show such disposition, the bankrupt has a right to present his application for a discharge, because the statute gives him that right, and if there is no other reason than such as appears in this case his discharge ought to be granted.

The order of the district court, therefore, will be reversed, and that court directed to proceed and grant the discharge, unless some other reason is found to exist than that stated in the order here sought to be reviewed.

## ALEXANDER and others, Assignees, etc., v. GALT.

*(District Court, N. D. Illinois. November 1, 1881.)*

## 1. BANKRUPTCY—PREFERENCES—WHEN VALID.

Preferential payments, made more than three months before bankruptcy, cannot be set aside in favor of the assignee in bankruptcy.

## 2. ASSIGNEES.

Assignees in bankruptcy do not succeed to the rights of assignees in insolvency whose assignment they have had set aside.

In Bankruptcy.

*McFarren*, for plaintiffs.

*Chas. H. Roberts and Manahan & Ward*, for defendant.

BLODGETT, D. J. This is an action of trover to recover a promissory note made by one Williams to the bankrupts, Patterson & Co., and by them, as is alleged by plaintiffs, fraudulently indorsed and delivered to defendants. The material facts, as shown without dispute in the proofs, or by stipulation in writing, are as follows:

Patterson & Co. were engaged in business as bankers at Sterling, in this district, from 1869 to the sixteenth of January, 1878. On the seventeenth of January, 1878, said firm made a voluntary assignment of their property to one Roswell Champion, in trust, for the payment of their debts, but Champion, the assignee, did not file his inventory and bond with the clerk of the county court of Whiteside county, where the parties resided, pursuant to the statute of this state in regard to voluntary assignments, approved May 22, 1877, until the fifth of February, 1878.

On the twenty-fourth day of April, 1878, a petition in bankruptcy was filed in this court against Patterson & Co., on which they were subsequently adjudged bankrupts, and plaintiffs have been duly appointed and qualified assignees; and, under a decree of this court, in a suit brought by plaintiffs as assignees in bankruptcy, the assignment to Champion was set aside on the twentieth of July, 1879. It also appears in proof, and is undisputed, that defendant, Galt, was treasurer of a cheese factory in the vicinity of Sterling, and kept his funds as such treasurer on deposit with Patterson & Co., and that on the sixteenth of January, 1878, there was to his credit on this deposit account about \$1,540; that about two months before the sixteenth of January, defendant told J. M. Patterson, one of the firm, that the money to his credit as treasurer belonged to the cheese factory, and that he would draw it out unless he was sure of getting it or having it protected, and that Patterson then told him he should be protected. On the sixteenth of January Patterson & Co. were insolvent and on the eve of making an assignment for the benefit of their creditors, when J. M. Patterson took the note in question from the files of bills receivable belonging to his banking firm, computed the interest on it to that date, and charged the sum then due for principal and interest to the defendant's account as treasurer, indorsed the note with the firm name, and placed it, in an envelope, before them in the bank vault, containing some

other papers belonging to defendant, and credited bills receivable with the proceeds of the note so charged defendant. During the business hours of the 16th the bank was kept open for business. The bank did not open on the morning of the seventeenth of January, and about 9 o'clock in the morning the deed of assignment was delivered to Champion, assignee, and he was placed in possession of the bank by giving him a key, although another key was retained by the firm, and the inventory was not completed until several days after. The note in question was never delivered to Champion, nor was it described in the inventory, and some time during the forenoon of the 17th defendant came to the bank, and, on being told what had been done in regard to the transfer of the note to him, assented to it, and took the note away. He has since brought suit upon the note against the maker and collected the amount due thereon.

Plaintiffs do not claim that this transaction is affected by the provisions of sections 5128 and 5129, as amended by section 10 of the act of June 22, 1874, but they insist that this property was conveyed by the bankrupt in fraud of his creditors, and can be attached under the provision of section 5046; or, in other words, that this transfer is so far tainted with actual fraud as to be voidable outside of the provisions of the bankrupt law. There can be no doubt that the title to property conveyed or converted by a bankrupt before bankruptcy, with a fraudulent *animus* or intent, passes to his assignee under section 5046, and the assignee can take steps to set aside the fraudulent transfer or conveyance. But a mere preference or payment of one creditor over another is not of itself fraudulent. As was said by the supreme court of Pennsylvania, Judge Strong delivering the opinion:

"An insolvent debtor may prefer one creditor to another, either by judgment, deed, or by any mode, if his motive be an honest intent to pay the preferred debt, although the unpreferred creditors be delayed or wholly prevented from obtaining payment. The payment of a debt to one creditor is no fraud upon another creditor." *York County Bank v. Carter*, 38 Pa. St. 446.

The principle which runs all through the cases is that to make a preferential payment of an indebtedness is not fraudulent; while if, under pretext of paying one creditor, a debtor conveys to him property of value largely in excess of the debt, with the design of thereby hindering and delaying other creditors, and securing some direct or indirect benefit to himself, the transaction may be deemed fraudulent.

Tested by this rule I can see no element of fraud in this transaction. There is no doubt that Patterson & Co. owed defendant, as treasurer, more than the amount of this note. Nor is there any doubt, from the proof, that he allowed the money to remain on deposit with them upon the assurance that he should be secured or protected. When Patterson & Co. saw that their failure was inevi-

table they had the right to make good the promise that he should be protected. It is true that if Patterson & Co. had been adjudged bankrupts within three months after the transfer of this note, their assignees in bankruptcy could have attacked this transfer as a preference contrary to the express provisions of the bankrupt law then in force, and perhaps set it aside. But the provisions of the bankrupt law, prohibiting preferential payments and conveyances, was not invoked in apt time, and this transaction is to be considered as if no bankrupt law had ever existed.

Complainants have cited a large number of decisions by the Iowa courts upon the statute of that state regulating assignments with preferences, and insist that as the statute of Illinois, in regard to voluntary assignments, approved May 22, 1877, was substantially copied from the Iowa statute, these decisions should be deemed controlling. There would seem to be no doubt that the doctrine of those cases is that if an insolvent debtor makes several preferential payments to creditors, or conveyances of property in payment of debts, in such sequence to each other, and to an assignment in trust for the benefit of creditors, that they are all to be deemed as essentially one transaction, the preference will be set aside as being in violation of the spirit of these statutes. *Lampson v. Arnold*, 19 Iowa, 480. And in this class of cases it has been held that the voluntary assignee can set aside the preference and recover the property transferred or money paid. These authorities only go to the point that if the transfer of this note to defendant was so intimately related to the assignment to Champion that they could be held to be one transaction, Champion could have held the note as against defendant. But when this court set the assignment to Champion aside, it did not place plaintiffs in his shoes as against defendant; that is, it does not follow, because Champion might have attacked this transfer as a preference, that, therefore, the plaintiffs can do so. They do not succeed to his rights of action under the Illinois statute, if he had any, but must rest upon their rights under the bankrupt law.

This, then, being at most only a preferential payment, made more than three months before bankruptcy, cannot be set aside in favor of plaintiffs. Defendant not guilty.

CHALMERS SPENCE PATENT NON-CONDUCTOR CO. v. PIERCE and others.\*

(Circuit Court, E. D. Pennsylvania. August 15, 1881.)

1. PATENT—INFRINGEMENT—COVERING FOR BOILER.

Patent No. 55,598, for an improved mode of covering steam-boilers, consisting of a covering of felt, supported on an open metallic frame-work separated from the boiler by studs or struts, *held*, to be infringed by a covering of felt, supported on a metal jacket, so punched that it is full of V-shaped points, which separate it from the boiler.

Hearing on Bill, Answer, and Proofs.

This was a bill for an injunction against the infringement by defendants of letters patent No. 55,598, issued to John Ashcroft, under date of June 19, 1866, for an "improved mode of covering steam-boilers or pipes." Defendants denied the infringement. Plaintiff's invention consisted in covering steam-boilers with a covering of felt, supported on a frame-work of wire or small iron bars, forming an open frame-work removed a short distance from the boiler and supported by studs or struts. Defendants' invention consisted of a covering of felt, supported on a sheet-iron metal jacket, so punched that it was full of V-shaped points, which touched the surface of the boiler and held the jacket equidistant from the surface.

*E. B. Barnum*, for complainant.

*J. R. Sypher*, for respondents.

BUTLER, D. J. In a former suit (against Camp and others) the court passed upon the plaintiff's patent, and held it to be valid. The only question now involved is that of *infringement*; and this was decided against defendant on the motion for preliminary injunction. Comparing the two devices, we found no material difference between them, and *McKenna*, C. J., then delivered the following opinion:

"There is but a single question, and a very narrow one, involved in this hearing. It is admitted that this patent is valid, and that in so far as it was rendered valid by an invention of John Ashcroft, it is not in question upon this motion. It is alleged, and has been argued here, that John Ashcroft's invention consisted in the devising of this jacket and its support upon the outer surface of the boiler to be covered. Now the patentee says this 'frame-work, *c*, can be easily constructed or built up of wire, small iron bars, or gas-pipes, unwelded, forming an open frame-work with meshes of the size of the metallic bars used, for the size of the meshes must depend upon the size of the boiler, or pipe, being a matter of mere judgment.' The claim of the patent refers to the construction and operation of this jacket, as it is to be constructed and operated, substantially as described in the patent; that is to say, an open frame-work supported on the boiler by appropriate studs. 'This frame-work must be supported by suitable studs, or struts, which can be constructed in

\*Reported by Frank P. Frichard, Esq., of the Philadelphia bar.

sections so as to be easily removed.' What is contemplated is just this, an open jacket, supported by suitable studs, or struts. That is one form in which the invention is to be carried into effect, and which it is necessary to describe in order to make his patent valid, but he is not confined so as not to be able to use any other form which is not substantially different from that, nor is he confined to any method of attaching the struts other than the one that is shown in the patent; that is not made an essential part of the invention at all. The object is to keep it off of the boiler, and that is to be accomplished by the use of struts adapted to that purpose. But the patentee is not confined to any particular mode of attachment on the jacket; so that the question to be considered comes down to this, which has been repeatedly said during the progress of the argument: Whether the alleged infringing device is substantially different from the one embraced in the patent, and that must be determined with reference to the function to be performed, or the mode in which that function is effectuated. What is the difference? Here you have a jacket with quite a large number of perforations in it. I do not profess to be a skilled mechanic, but it does seem to me to be obvious that all these struts are not necessary to furnish a support to the jacket.

"This [indicating] is supported without anything like the number of struts that are in this model [indicating.] Why are so many put in this model [indicating]? It seems to me that it is obviously to make available an advantage which would be derivable from the perforations of this material; or, in other words, to make available whatever would be the result obtained from the meshes or the perforations by the punching of more holes than are actually required to furnish a support to this jacket. Then you have the perforated, or meshed jacket; which is supported by struts. As I have already remarked, the form or mode of attaching these struts to the jacket is not made an essential part of the patent. There must be struts, but they are to be appropriately attached. Now, instead of being riveted or screwed on, they are punched out of the material itself—instead of taking a separate piece of material and riveting it on, the strut is made by a punch in the material of the jacket, so that you have the same function and precisely the same mode of operation. You have the jacket resting upon the boiler and supported by it in precisely the same way and by the use of precisely the same means. What difference is there in the mode of operation? There is no earthly difference except as to the manner in which the struts are made. There is no other difference about it. The patentee has not limited himself to any particular mode of making these struts. They are to be applied with reference to the function to be performed; that is, that they shall support the jacket upon the boiler. That is what is done here, and that is all that is done, in so far as the mode of operation is concerned. As we have already said, you have the perforations or the meshes, and these holes, which operate precisely in the same way, so that guided by our own eyes we have no doubt that there is no fundamental difference between these devices, and we therefore grant the injunction."

Nothing material has been developed since the foregoing views were expressed. An elaborate and able argument has been presented

to show that the plaintiffs' claim and patent should be confined to the "metallic frame-work." But adopting this view would not help the defendants. The fact that they have copied the "metallic frame-work," would remain. We say *copied*, because this, in effect, is what they have done. There is no material difference between the two devices. The mechanical difference in *construction*, is unimportant. When constructed,—considered as instruments for the use contemplated,—they are substantially identical.

The meshes, or open spaces, in the "metallic frame-work," are covered by the claim, though the patent may not be confined to them. The method of construction specified produces meshes, and the model filed exhibits them. That their uses are not specified is unimportant. The plaintiffs have the benefit of all uses to which they can be applied. The ingenious argument based on a different view of the patent thus loses its effect.

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ILLINGWORTH *v.* SPAULDING, JENNINGS & Co.

(*Circuit Court, D. New Jersey. July 23, 1881.*)

1. LETTERS PATENT—PRELIMINARY INJUNCTION.

A preliminary injunction will not be granted where the defendant's affidavits make out a case of reasonable doubt as to the novelty of the complainant's patent.

2. SAME—SAME.

*Semble* that the same rule applies as to its validity.

In Equity.

NIXON, D. J. This is an application for a preliminary injunction. None should ever be granted where the answering affidavits of the defendants show a reasonable doubt about the novelty or validity of the complainant's patent. This was done at the hearing by exhibiting a certified copy of English letters patent No. 3,801, for improvements in the manufacture of plated and gilded ingots of iron and steel, and in the moulds used for that purpose, ceded to William Morse on the nineteenth of May, 1874. After an inspection and examination of the provisional and complete specifications and drawings of the said Morse patent on the argument, I intimated that they suggested a sufficient uncertainty in regard to the novelty of the complainant's patent to warrant the court in refusing the application. The counsel for the complainant afterwards submitted to me several affidavits, taken without notice, and purporting to be verified



before a master in the court of chancery of New Jersey, tending to show that, although the patent to Morse antedated the Illingworth patent on which the suit was brought, the invention of the latter was in fact perfected several weeks before the actual sealing of the complete specifications of Morse, and claimed that, under the rule, he was entitled to use such affidavits in reply to the affidavits of the defendants on the complainant's motion. But this is not allowable. Such a practice would often result in determining what seems to be the vital question of a cause upon *ex parte* affidavits.

The complainant must wait for his injunction until the final hearing, when the court will be better able upon the proofs to ascertain the facts. The injunction is refused.

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CONSOLIDATED MIDLINGS PURIFIER CO. v. GUILDER.

(Circuit Court, D. Minnesota. October, 1881.)

1. LETTERS PATENT—ASSIGNMENT—ESTOPPEL.

An assignor of a patent, who had agreed to stop manufacturing the patented machines and had paid a license fee, agreed upon, to his assignee for the privilege of selling machines he had on hand, is estopped from denying its validity, in a suit against him by the assignee for its infringement, by manufacture and sale under letters patent issued subsequently to the assignment.

2. SAME—MIDLINGS PURIFIERS.

Reissue No. 8,386, and letters patent No. 225,218, are substantially for the same machine.

*R. Mason and J. B. & W. H. Sanborn*, for complainant.

*Shaw, Levi & Cray and R. C. Benton*, for defendant.

NELSON, D. J. A motion is made upon bill and affidavits for a preliminary injunction *pendente lite*. The defendant resists the application upon affidavits, and since the notice of motion an answer is filed, which, under the rule, is used upon the hearing as an affidavit with the others presented. The bill is filed for an account, and to recover damages for an infringement of certain letters patent granted for improvements in purifying and dressing midlings, and owned by the complainant, and a permanent injunction is prayed for. The bill of complaint sets up several patents, and charges the defendant with infringing each of them.

The complainant on May 29, 1879, purchased and took an assignment of all patents owned by defendant, among them reissue No. 8,386, under the following circumstances:

The defendant was manufacturing machines for purifying middlings under letters patent, and the complainant, believing that he was trespassing upon its rights, had an interview through an agent, when a settlement was perfected. The complainant agreed to give \$5,000 for all the patents owned by the defendant if he would stop manufacturing and quit the business, and also agreed to permit the defendant to sell certain machines he had made on payment of a royalty, which the defendant accepted. An assignment was executed, and delivered to the firm of which the agent was a member, of defendant's patents, which were finally assigned by said firm to the complainant, and the defendant has paid the royalty exacted for the machines on hand, and for some time stopped manufacturing. On March 9, 1880, letters patent No. 225,218, "for an improvement in middlings purifiers," was granted defendant, and he commenced to manufacture under this patent, and has been selling machines.

The defendant, in his answer, admits that he made a full assignment of the patents owned by him, including reissue No. 8,386, to the firm of Bennett, Knickerbacker & Co., but denies that he agreed to quit the business of manufacturing purifiers; and also alleges, among other things, that reissue No. 8,386 is invalid, and that the claims therein made by him were expanded beyond the original invention.

It satisfactorily appeared on the hearing that Knickerbacker, who conducted the negotiation with the defendant, was duly authorized to act for the complainant, and that he conducted the same on its behalf; and also that, as a part of the settlement made, the defendant agreed to stop manufacturing, and the payment of royalty for machines on hand is not denied.

On the facts as thus established the defendant, in my opinion, cannot set up as a defence the invalidity of the assigned patents. He was not ignorant at the time of the settlement, and when he made the assignment, of all the facts which are set up in his answer, and he knew of the existence and full mechanism and operation of the machines now alleged by him to have anticipated one, at least, of those assigned the complainant; and, having made the agreement above stated, and paid royalty for license to sell, it would be inequitable to permit such a defence now to be made. He, of course, is free to exercise his inventive genius, and manufacture and sell any improvements for which he may secure letters patent, provided he does not infringe the complainant's rights. On this motion, in the view taken by the court, the fourth claim only of letters patent reissue No. 8,386 will be referred to in connection with No. 225,218, and the issue of infringement considered, and to do this satisfactorily,

and determine whether defendant is a trespasser, an examination of the Guilder patent and reissue is necessary.

Guilder's patent—reissue No. 8,386—claims:

"(4) The combination, with a<sup>1</sup> reciprocating riddle or shaker of a<sup>2</sup> brush moving transversely across the entire under surface of the riddle, and independently of the movement of said riddle, substantially as and for the purposes set forth."

In his specifications he states—

"That his invention has relation to machines for purifying flour and middlings, wherein a suction fan and adjustable suction spouts are arranged over a riddle and endless conveyers, arranged beneath the riddle. \* \* \* It also consists in the employment of detachable brush carriers or brush holders, which hold the brushes in contact with the under side of the riddle during the upper part of their revolution."

"It also consists in giving to the said brushes a continuous transverse motion across the bottom of the said riddle."

He afterwards describes the function of the brushes:

"Beneath the riddle, C, is a transverse division, H, which leaves \* \* \* a space, J, on one side of it, for the material, which passes first through the riddle and a space, J prime, for the coarser material, which passes afterwards \* \* \*. In each space or compartment (J, or J prime) are single-row dusting brushes, which are arranged to sweep across the bottom of the riddle cloth, from side to side, so that they move at right angles to the material in its passage over the riddle, thus avoiding the mixing of the different grades of the material and keeping the cloth clear."

This patent is for a new combination of old elements, and the brushes are so arranged that the meshes of the riddle cloth are kept clear, and at the same time the brush, moving transversely at right angles to the flow of the material, prevents the mixing of the coarser with the finer middlings. In other previous combinations the brush, moving in the direction of the flow of the middlings, would carry some of the coarser middlings with it and deposit them in the compartment containing the finer middlings.

In Guilder's patent, No. 225,218, issued in March, 1880, which is the machine manufactured, and is alleged to be substantially the old patent, reissue 8,386, with some additional contrivances, he claims:

"(5) The combination of the reciprocating bolt, Gg, and transversely moving brush, K, having a longitudinal reciprocating motion, substantially as and for the purpose described."

In the specifications he describes the operation of purifying middlings in the machine, and the function of the various contrivances and mechanism used, which it is not necessary to set forth, except what is said about the brush, which is this:

"K is a brush longitudinally under the bolt cloth, *g*, the bristles of which are fast in the stock, K prime; *k k* are supports to the brush stock; \* \* \* L is a transverse guide stock attached to one of the supports, *k k*, and has secured upon its upper edge a corrugated guide plate, *l*, that goes between two friction rollers on downward projecting studs on the under side of brush stock, K prime."

This brush stock is attached to endless chains, and travels with them in a transverse direction across the entire width of the bolt cloth in the corrugated or bent guide plate, and so moving gives the brush a longitudinal or endwise motion of several reciprocations while in contact with and sweeping across the bolt cloth, and when a current of air, by means of a suction fan, is passing through the middlings. This motion in two directions, vibratory while in contact with the bolt cloth, is said to be more effective in clearing its meshes from adhering substances.

If it is conceded that the zigzag motion given the brush, while moving transversely across the under side of the bolt cloth, makes its operation more effective, and the device of a corrugated guide renders the brush more serviceable, still the brush, in combination with the reciprocating sieve or bolt cloth in No. 225,218, moves transversely across the under side of the bolt cloth, at right angles to the material, in its passage, and performs the same function, and keeps the cloth clear, substantially as in No. 8,386. The fact that the brush, while crossing, is given what is called a longitudinal reciprocating motion, does not render the combination different from his previous patent. It embodies the substantial idea therein set forth. It may be better to adopt the motion given the brush by defendant, and he may be able to prevent the use by others of his device; but in the use of the combination described he violates his agreement with plaintiff. The identity of the two patents sufficiently appears; and, although there has been no judicial decision in favor of the validity of reissue No. 8,386, a preliminary injunction must be granted, unless the defendant gives bond in an amount large enough to pay the royalty on each machine manufactured by him, as shall be determined hereafter.

It is so ordered.

## GOULD v. STAPLES.

(Circuit Court, D. Maine. September 5, 1881.)

## 1. ADMIRALTY—CONSULAR AGENTS—CONSULS.

Under the provisions of the statutes and established regulations, a consular agent is the representative of the consul to whom he is subordinate.

## 2. SAME—REV. ST. § 4309.

An arrival at a foreign port from another foreign port is within the purview of section 4309 of the Revised Statutes.

## 3. SAME—CONSULAR REGULATIONS OF MAY 1, 1881.

*Semble* that Hieres is not within such reasonable distance of the port of Toulon, and the communication between the two points so free from difficulty, as to require a master, under the provisions of paragraph 179 of the consular regulations of May 1, 1881, on arriving there, to deposit his ship's papers at the Toulon consulate.

W. F. Lunt, Dist Atty., for plaintiff.

H. D. Hadlock, for defendant.

Fox, D. J. This action is brought by the consul of the United States at the city of Marseilles, France, to recover from the defendant, master of the ship Charter Oak, the penalty of \$500 prescribed by the Revised Statutes, § 4310, for not depositing his ship's papers with the consular agent of the United States at Toulon, in December, 1879; the ship having arrived at Hieres, which was "within the consular jurisdiction of the consul of the United States residing at Marseilles, the said consul having a consular agent at Toulon." Hieres is about 20 miles from Toulon; about four miles from the shore, near the head of a bay. There is no harbor at this place, but only an open roadstead with a sandy bottom. There is no representative of the United States at Hieres, the nearest being at Toulon, at which place there is a consular agent who is subordinate to the consul at Marseilles.

The Charter Oak, in September, 1879, sailed from New York to Genoa with a cargo of oil. On the second of December she sailed from Genoa for Hieres, for a homeward cargo of salt, arriving there the next day, but on account of bad weather she did not reach the loading ground till the 5th, when she made fast to the mooring chains. On the twelfth and seventeenth of December the consular agent at Toulon notified the defendant by letter that he must come to that city, and deposit with him at the consulate the ship's papers. These demands were never complied with.

Section 4309 of the Revised Statutes requires of every master of a ship, belonging to citizens of the United States, who shall sail from a port in the United States—

"That he shall, upon his arrival at a foreign port, deposit his register, etc., with the consul, vice-consul, commercial agent, or vice-commercial agent, if any there be at such port. And it shall be the duty of such consul, etc., upon such master producing to him a clearance from the proper officer of the port where his vessel may be, to deliver to such master all of his papers, if he has complied with the provisions of law relating to the discharge of seamen, etc., and to the payment of the fees to the consular officers."

Section 4310 imposes a penalty of \$500 upon the master of any such vessel who refuses or neglects to deposit his papers as thus required, the same to be recovered by such consul, in his own name, for the benefit of the United States.

Neither of the officials named in these sections was to be found at either Hieres or Toulon; but at the latter port the consul at Marseilles was represented by an agent, recognized by the laws of the United States. Section 1674 of the Revised Statutes enacts—

"That 'consular agents' shall be deemed to denote 'consular officers' subordinate to their principals, the consuls, exercising the powers and performing the duties within the limits of their consulates \* \* \* at such ports or places different from those at which such principals are located."

By section 1695 the president is authorized to appoint consular agents in such numbers and under such regulations as he may deem proper. By paragraph 17, consular regulations of 1881, consular agents are described as—

"Acting only as the representatives of their principals, and are subject and subordinate to them, and are paid only by the fees collected by them, retaining the whole or such portion as may be agreed upon between them and their principals, the residue being received by the principal, under the sanction of the president."

From these provisions of the statutes and established regulations, it is manifest that the consular agent of the United States at Toulon was in law a representative of the plaintiff, and that through him the plaintiff was in fact the consul for the port of Toulon, discharging all the duties of a consul at that port as effectually as if there present attending to them in person; and if the Charter Oak had arrived at Toulon her master would have been bound to have deposited his papers at the consulate in that city with the agent of the plaintiff, and on failure so to do would have been liable to the plaintiff for the penalty.

It is objected that the Charter Oak, on her arrival at Hieres, came from the foreign port of Genoa and not from a port in the United States, and that the statute only requires a ship's papers to be deposited with the consul at the first port at which she may arrive after

leaving this country, and that her master is not required to deposit his papers with the consuls at every other foreign port to which she may subsequently proceed. The language of the section is certainly somewhat ambiguous, and is as follows: "Every master, etc., who shall sail from any port in the United States, shall, on his arrival at any foreign port, etc., deposit his papers with the consul." In the opinion of the court this provision of law requires that at every foreign port where the designated officer is to be found, the master, on his arrival, is obliged to deposit with him his ship's papers. Every additional port, subsequent to the first to which he may proceed in the course of the voyage, is an arrival at a foreign port by him. The case is within the letter of the act, and the same reasons which would call for the ship's papers at the first port at which he might arrive would be alike applicable on his arrival at any other port. The case of *Parsons v. Hunter*, 2 Sumn. 419, was one similar to the present. There, the ship, on her voyage from Matanzas to London, touched at Cowes, and her master, failing to deposit his papers with the consul at Cowes, this suit was instituted for the penalty. This objection was patent on the record, was of a preliminary nature, and if tenable could not have escaped the attention of so careful and discriminating a judge as was Mr. Justice Story. The defendant in that case prevailed, and the reasons of the learned judge for his decision are set forth in a full and elaborate opinion; but the present objection is not suggested as arising in the cause.

Paragraph 179 of the consular regulations promulgated May 1, 1881, is as follows:

"A vessel arriving within a consular district, although at some port other than that at which the consular office is situated, makes an arrival in such sense as to require a deposit of the vessel's papers, and to subject her to consular jurisdiction, if the port which she actually enters is within reasonable distance from the consulate, and the communication between the two ports is not difficult."

This regulation was not promulgated until after the failure of the defendant to deposit his papers with the consular agent at Toulon, herein complained of, and therefore can have no effect upon the rights of the parties to the present suit. The president is by law empowered to prescribe regulations for consuls; but he has no authority to change or modify the law, and thereby subject a master, who fails to comply with such regulations, to penalties nowhere imposed by any act of congress. Whether paragraph 179 is or not a true con-

struction of the provisions of the act of congress upon this subject, may possibly admit of some doubt; and the same is left for further consideration when it shall be necessary to pass upon it, as, under the circumstances of the present case, in the opinion of the court, the port of Hieres is not within such reasonable distance of the port of Toulon as to require the master of a ship, arriving at Hieres, to deposit his ship's papers at the Toulon consulate. Such a requirement is unreasonable, and would demand of the master a neglect of other duties and impose upon him a burden which a ship-master ought not to be subjected to.

That the ship lay about four miles from the town of Hieres, which is about 20 miles from Toulon, are matters about which there is no controversy. There is some question as to the means of communication between Hieres and Toulon. The consul, in his communication to the department of state, which is admitted as testimony by consent, says "the two places are connected by a railroad line, with four trains running daily, performing the passage within one hour." Whether all these are or not passenger trains is not stated; neither does it distinctly appear that there were four trains each way, but only that there were four trains passing each day between the two places. The master's testimony is that after receiving the notice from the consular agent at Toulon he applied to his consignees and was informed by them "that it was not the practice for American ship-masters arriving at Hieres to leave their papers at the Toulon consulate, and that, as the trains ran, if he went to Toulon he must be absent from his ship all night." That the master acted in good faith and believed the statement of his consignees the court does not question. The burden is on the plaintiff to establish that the consular agent at Toulon was "within reasonable distance, and that communication with him was not difficult."

In *Harrison v. Vose*, 9 How. 378, which was an action against a consul similar to the present, the principle is laid down by *Woodbury, J.*,—

"That we must begin the inquiry with the presumption that the defendant is innocent, and that the burden of proof to make out his guilt devolves upon the plaintiff. In the construction of a penal statute it is well settled that all reasonable doubts concerning its meaning ought to operate in favor of the respondent. \* \* \* Where penalties are to be recovered greater fullness of evidence is necessary to make out such a case. The proof must, then, bring the transaction within the spirit as well as the letter of the law, and must usually show a plain breach of both."

—And in the opinion of the court this the plaintiff has failed to do.



The proper place for a master of a ship of the burden of the Charter Oak, when in a foreign port, is on board his ship. His presence is always promotive of obedience and good discipline, and of attention to their duty, by the crew, and he should never be absent therefrom unless the emergency is urgent. More especially was such the duty of the master of this ship, moored in an open roadstead, in the month of December, on the Mediterranean coast, with mooring tackle of a doubtful character. As the master says: "The mooring chains to which he made fast were smaller than the ship's chains, and he distrusted their holding her if a storm should arise." That they were liable to gales while at this anchorage is shown by the log-book, as it recites that on the day of their arrival at Hieres "it was blowing a gale, with rain." The record for the next day is: "Came on with hard gale, and rain much of the time." Some days the weather was fine, and they were employed taking in cargo. December 15th, the log says, "Strong breeze and clear. Large swell. No cargo." December 16th, "No cargo; large swell." December 17th, "No cargo." December 18th, "Fresh easterly gale; clear; no cargo." The master testifies "that with wind from S. E. to E. N. E. they could not land from the ship; that with the light mooring chains he was afraid of being driven on shore; did not dare to leave the ship over night, on account of the danger." Only on two occasions did he go to Hieres. "Went there for funds. Selected the best chances when the wind was to the westward. Was not gone over three hours at either time. On one of these occasions the wind chopped round suddenly, so that on his attempting to go to the ship the surf filled his boat. With the wind from the eastward, lighters could not come off with cargo. With the sudden changes of the wind the ship was in danger."

Situated as the Charter Oak thus was, the court finds that it would have been highly imprudent for the master to have been absent from his ship all night. His first duty was to the ship, her cargo, and his crew, and his absence from her for that length of time would have unjustifiably exposed her to peril and danger. If, in his absence, a violent storm should arise, which not unfrequently happens on that coast, the ship was liable to be driven from her moorings, either on shore or to sea; and in such an emergency the master's presence, with his skill and experience, might have proved of the greatest advantage in protecting the lives of the crew and saving the property in his charge, which otherwise might have become a total loss. If obliged to deposit her papers at the Toulon consulate, the master

must have been absent from his ship two nights—one to leave them, the other to obtain them—and such a requirement, in the opinion of the court, is so unreasonable that it ought not to meet with its sanction and approval. To use the words of *Woodbury, J.*, in *Harrison v. Vose*, before cited, p. 383:

“The requirement would be oppressive in the extreme. It would embarrass and clog, rather than aid commerce, which last is peculiarly the design and policy of legislation by the general government on this vital subject.”

The interest of commerce and navigation will be greatly promoted by so construing the acts of congress as to encourage a master in remaining on board his ship whenever situated as the *Charter Oak* was, and he should never be compelled to be absent from her for any considerable time in search of a consulate, at some port other than that at which his ship has arrived, subjecting his owners to unnecessary expense, and the vessel and cargo, upon sudden peril and emergency, to serious consequences which might result from his absence. If any great benefit is supposed to arise from the ship's papers being in the hands of the consul, consular agencies can be established at every port which our ships may visit, as the president is authorized to appoint so many of these officers as he shall deem expedient. Adopting this course, a consulate could be reached by the master without delay or expense. The provisions of law could then be complied with by him without the great peril and risk which might frequently attend its observance, if the defendant should be held to have violated the law in the present instance.

The defendant is adjudged to be without fault, and is entitled to judgment.

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### THE CLYMENE.\*

(*District Court, E. D. Pennsylvania.* October 12, 1881.)

#### 1. CONSTITUTIONAL LAW—PILOTAGE—AUTHORITY OF STATE.

Under the acts of congress of August 7, 1789, and March 2, 1837, each state has authority over the subject of pilotage on the navigable waters within its limits, although such authority is not exclusive.

#### 2. SAME.

Each state may, therefore, license pilots and provide regulations for their government and employment, but it cannot exclude others duly licensed elsewhere from employment on the public waters of the nation, either on the ground that those waters are within the territorial limits or on the ground that the vessel to be piloted is bound to a port within its territory.

\*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

## 3. SAME—STATUTE EXERCISING EXCLUSIVE JURISDICTION—INVALIDITY OF.

A state statute which prohibits any one not licensed under the authority of the state from piloting a vessel to a port within the state is void, so far as it interferes with the employment, on public waters, of pilots licensed by other states bordering thereon.

## 4. SAME—PILOTAGE LAWS OF PENNSYLVANIA AND DELAWARE.

A pilot licensed by the state of Delaware *held* entitled to recover for services in piloting a vessel up the Delaware bay and river to Philadelphia, notwithstanding a law of Pennsylvania prohibiting any one from acting as such pilot without a Pennsylvania license.

## In Admiralty. Hearing on libel and answer.

This was a libel by Robert C. Chambers, pilot, against the steamship *Clymene*, setting forth that in June, 1881, the steamship being at the entrance of Delaware bay, libellant boarded her and offered his services as pilot to conduct her to Philadelphia, her port of destination; that his services were accepted, and that he did pilot the steamship to Philadelphia. The libel further set forth that libellant was a regular pilot under an act of assembly of the state of Delaware, passed April 5, 1881, and that he was entitled to the pilotage fees prescribed by that act, but that the master of the steamship refused to pay the same.

The answer of the master admitted the performance of the pilotage service, but set forth that from the year 1803 to the passage of the Delaware act of April 5, 1881, under which libellant claimed, there was no system of pilotage laws in force on the bay and river Delaware, except the law enacted by the state of Pennsylvania, March 29, 1803, (4 Sm. Laws, 73,) and that during the same period there were no pilots on said bay and river except those licensed under said act of 1803 by the board of wardens of the port of Philadelphia, under whose license libellant himself acted as pilot for several years, until he surrendered the same and took a license from the state of Delaware under the act of April 5, 1881; that when libellant boarded the steamship she was on the high seas, and respondent, without making any contract with libellant, allowed him to act as pilot, supposing that he was duly licensed under the laws of Pennsylvania; that respondent was advised that the state of Delaware had no power to require vessels bound to the port of Philadelphia to take a pilot or to regulate his compensation, and that the act of April 5, 1881, had no extraterritorial virtue; that by an act of assembly of the state of Pennsylvania, approved February 4, 1846, (P. Laws, 30,) it is made an indictable offence for any person to pilot a vessel into the port of Philadelphia without a license from the board of wardens, and that as libellant had no such license his services were illegal, and he could not recover therefor.

*Henry Flanders* and *Hon. Thomas F. Bayard*, for libellant.

*Henry G. Ward*, *Morton P. Henry*, and *Richard C. McMurtrie*, for respondent.

BUTLER, D. J. The claim is for services rendered in piloting the respondent up the Delaware bay and river to Philadelphia. The tender and acceptance of the service, as well as its performance, is

admitted by the answer. The refusal to pay is rested on an allegation that the libellant had no authority to perform the service,—that he was liable to indictment, under the laws of Pennsylvania, for performing it, and that the service was accepted in ignorance of such want of authority. The libellant was duly licensed under a statute of the state of Delaware, approved April 5, 1881. Does this license authorize him to do what he undertook? This is the only question presented. Jurisdiction over the subject of pilotage, is conferred upon the federal government by the third clause of article 8 of the constitution,—which provides for the regulation of commerce: *Cooley v. The Port Wardens*, 12 How. 299. Whether the states might exercise jurisdiction until such time as congress should interfere, is a vexed question,—about which the judges disagreed in the case cited. To sustain such jurisdiction it must be held that the constitutional grant of authority to the federal government did not, of itself, oust the authority of the states. While such a view might seem to be illogical, it is not inconsistent with what has frequently been asserted by the supreme court in similar cases. As is said in *Henderson v. The Mayor*, 92 U. S. 259:

“It is stated in the decisions of this court that there is a kind of neutral ground, especially in that covered by the regulations of commerce, which may be occupied by the states, and its legislation be valid, so long as it interferes with no act of congress or treaty of the United States. Such a proposition is supported by the opinions of several of the judges in *The Passenger Cases*, 7 How. 283; *Cooley v. The Port Wardens*, Id.; and by the cases of *Crandall v. Nevada*, 6 Wall. 35, and *Gilman v. Philadelphia*, 3 Wall. 713. But the doctrine has always been controverted in the court, and has seldom, if ever, been stated without dissent.”

As, however, congress did interfere, by the statutes of 1789\* and 1837,† the jurisdiction of the states is now confined within the limits thus prescribed. The first of these statutes adopted the existing laws of the states, regulating and governing the subject of pilotage, and provided for the adoption of such others as they might thereafter make,—thus conferring upon the acts of the state legislatures the effect of federal statutes. Its language is as follows:

“All pilots in the bays, inlets, rivers, harbors and ports of the United States shall continue to be regulated in conformity with the existing laws of the states respectively, wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by congress.”

It might readily have been foreseen that the states, thus left to

\*1 St. 54.     †5 St. 153.

separate, independent action, would soon come in conflict. Two or more, bounding on the same water, each intent upon its individual interests, would be impelled to inconsistent hostile legislation. Such a result did follow, and to provide for it, congress in March, 1837. enacted—

“That it shall and may be lawful for the master or commander of any vessel coming into, or going out of, any port situate upon waters which are the boundary between two states, to employ any pilot duly authorized or licensed by the laws of either of the states bounded by said waters, to pilot said vessel to or from said port, any law, usage or custom to the contrary notwithstanding.”

The first of these statutes conferred on the state of Delaware (if she had it not before) authority over the subject of pilotage, on the navigable waters within her limits. Such at least was its effect. I do not mean to say that the authority thus conferred (or recognized) was *exclusive*, and might lawfully be exercised in hostility to her neighbors,—even before the enactment of the subsequent statute. I believe, indeed, that it was not exclusive; and that it could only be exercised in such manner as was consistent with the relations which the several states bear to each other as members of the federal government. *Gibbons v. Ogden*, 9 Wheat. 1; *The Daniel Ball*, 10 Wall. 563; *The Montello*, 11 Wall 411. The subsequent statute did not interfere with the proper exercise of this authority, but put the question just suggested at rest, by providing against such abusive, hostile exercise of it. She may license pilots, and provide regulations for their government and employment, but she may not exclude others, duly licensed elsewhere, from employment on the public waters of the nation, because these waters happen to be within her territorial limits. Those from Pennsylvania, as well as her own, may lawfully exercise their calling there, and vessels requiring such service may elect whom they will employ. That this statute was intended to apply to circumstances such as exist in this case I cannot doubt. They are clearly within its spirit, and with a just interpretation of its language, as clearly within its terms. It was so understood and applied by the supreme court of Pennsylvania in *Flanigen v. Ins. Co.* 7 Barr, 306; and so construed by congress in the subsequent statute of February, 1847, relating to the same subject.

In this view of the case the respondent's contention that “pilotage is the subject of local regulation of the state in which the port lies,” and therefore that Pennsylvania, in the absence of statutory prohi-

bition, has exclusive jurisdiction of pilotage respecting the port of Philadelphia and its commerce, is unimportant. It is not improper, however, to say (as before intimated) that I could not adopt this position, even in the absence of the statute last referred to. The relations of the states as members of the general government,—the fact that they are not separate independencies, and that the navigable waters within their respective limits are subject to common use,—must be constantly kept in view. The commerce on the Delaware bay and river, no matter where from or where bound, does not belong to Pennsylvania. That she and her citizens derive a larger share of benefit from it than her neighbors, is her good fortune, but it confers no right on her to say who shall enter a port within her limits, or what pilot shall be employed. The port itself, constituted of the public waters of the nation,—is not hers; and it is but by the grace of the general government that she is allowed any independent voice respecting it. In the absence of the statute of 1837, that of 1789, construed in the light of these facts, must have been held to confer on Pennsylvania, I believe, such authority only as is here conceded to her. Before the adoption of the federal constitution she had no jurisdiction whatever beyond her territorial limits. Since that event she has none (even within) except such as congress has conceded to her. She must be content, therefore, with a voice on the subject in common with her neighbors, who with her border on the waters which constitute her and their outlet to the sea.

It follows from what has been said that the libellant was a duly licensed pilot, authorized to do what he undertook; and that any law of Pennsylvania designed to interfere with him in this respect, is inoperative and void. It also follows that the provision of the Delaware statute, which contemplates an *exclusive* jurisdiction over the subject on waters within her limits,—by requiring “that any person exercising the profession of a pilot in the bay and river Delaware shall \* \* \* apply in person to the board of pilot commissioners (of the state of Delaware) for a license to entitle him to follow that occupation,”—is equally inoperative and void.

A decree must be entered in favor of the libellant for the amount claimed.

NOTE. The act of assembly of Pennsylvania of March 29, 1803, (4 Sm. Laws, 73,) provided *inter alia* that—

“Every person exercising the profession of a pilot in the bay or river Delaware shall \* \* \* apply in person to the board of wardens for the port of

Philadelphia for a license; \* \* \* and that it shall be the duty of at least three of the said wardens to examine every person so applying, \* \* \* and to grant licenses to all such as they shall deem qualified. \* \* \*

The act of assembly of Pennsylvania of February 4, 1846, (P. L. 30,) provides:

"If any person \* \* \* shall undertake to pilot any vessel in the bay or river Delaware \* \* \* without a license duly granted by the board of wardens of the port of Philadelphia, \* \* \* every person so offending shall, upon conviction thereof, be imprisoned for not less than one month nor more than one year, and be fined any sum not exceeding \$200, at the discretion of the court."

The act of assembly of Pennsylvania of March 24, 1851, (P. L. 229,) provided that "every vessel arriving from or bound to any foreign port \* \* \* shall be obliged to take a pilot. \* \* \*"

The act of assembly of the state of Delaware of April 5, 1881, provided *inter alia*—

"That any person exercising the profession of a pilot on the bay and river Delaware shall \* \* \* apply in person to the board of pilot commissioners for a license, \* \* \* and that it shall be the duty of at least three of said board to examine every person so applying, \* \* \* and to grant licenses to all such as they shall deem qualified; \* \* \* and if any person shall \* \* \* exercise the profession of pilot in the bay and river Delaware without such license, \* \* \* he shall forfeit for every vessel which he shall undertake to pilot \* \* \* \$30, together with the pilotage to which he would be otherwise entitled. \* \* \* That every ship or vessel \* \* \* passing in or out of Delaware bay by the way of Cape Henlopen shall be obliged to receive a pilot; \* \* \* that the pilot who shall first offer himself to any inward-bound ships or vessels shall be entitled to take charge thereof. \* \* \*"

## THE HARRISBURGH.\*

(Circuit Court, E. D. Pennsylvania. October 10, 1881.)

### 1. ADMIRALTY—COLLISION—DUTY OF STEAM-SHIP APPROACHING SAILING-VESSEL—PRESUMPTION AS TO LATTER'S COURSE.

When a steam-ship and a sailing-vessel are approaching each other, it is to be presumed the latter will pursue the customary course, at that point, of vessels bound in the direction in which she is sailing; and if that course would cause the vessels to approach on intersecting lines and create danger of collision, it is the duty of the steam-ship to make such timely reduction of her speed or change of her course as would avoid such danger. A failure to do this will render the steam-ship liable in case of collision.

### Appeal from the Decree of the District Court.

This was a libel by the owners of the schooner Marietta Tilton against the steamship Harrisburgh to recover damages for the loss of the schooner by a collision. The facts are sufficiently set forth in the opinion. The district court, in an opinion reported 36 Leg. Int. 66, dismissed the libel, and from that decree the present appeal was taken.

\*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

*Curtis Tilton and Henry Flanders*, for appellants.

*Thomas Hart, Jr., and J. Warren Coulston*, for appellees.

McKENNAN, C. J. Finding of facts by the court:

(1) On the evening of the sixteenth of May, 1877, a little before 9 o'clock, a collision occurred between the schooner *Marietta Tilton*, of which the libellants were owners, and the steamer *Harrisburgh*, which resulted in the entire loss of the schooner and her cargo, and in the drowning of six of her crew,—all but two of those who were aboard of her.

(2) The place where the collision occurred was within 100 yards of Cross Rip light-ship, off the coast of Massachusetts.

(3) The night was unusually clear, the moon shining in her first quarter, and objects were distinctly visible at a long distance, the vessels having actually sighted each other when they were about four miles apart.

(4) At the point where the collision occurred the channel was nearly a mile wide, the light-ship being on the southern border of it, and there being a sufficient depth of water for the passage of the steamer in any part of it.

(5) The steam-ship was pursuing a westwardly course, heading for the light-ship upon a straight line which would pass slightly north of it; or, in the language of the mate, "I ported my bow and headed my ship for the light-ship, keeping the light a little on my port bow." This course she maintained without any deviation or reduction of her speed.

(6) The schooner was sailing eastwardly, and when she was first seen by the steamer her position was considerably (not less than a half mile) north of the line of the steamer's progress, and so north-westward of the light-ship. When the vessels were at a safe distance apart the schooner luffed a little to the windward, and thence, sailing on the wind, which was from the south-west, she pursued a course directly towards the light-ship, upon a line which was oblique to that of the steamer's course, exposing her port light to the steamer. This was the course laid down in the sailing directions for vessels bound eastward, and she kept it steadily.

(7) The courses of the vessels thus converging to the light-ship, they must necessarily have moved upon intersecting lines.

(8) When they were within three or four hundred feet of each other, and the peril was imminent, the schooner ported and the steamer starboarded her helm, and ran stern on into the port side of the schooner and sank her.

#### CONCLUSIONS OF LAW.

Most of the facts found above are undisputed. Those which are of decisive significance have been the subjects of very earnest and exhaustive contestation, and the evidence touching them is, to some extent, conflicting. It has, therefore, been the duty of the court to collate and consider carefully this evidence; and it is believed that the facts found are the result of the preponderating weight of it, and of the inherent probability of their truth. It would be superfluous to vindicate these conclusions by a detailed discussion of the evidence,



because they are not subject to review. It is enough to state them, and apply the law to them. That is simple and well settled. It gave the right of way to the schooner, and required her to keep her course, which she did; it imposed upon the steamer the duty of slowing up, stopping, or changing her course, neither of which she did. The adoption of either of these precautions would have averted the disaster. The circumstances were such as to make this duty imperative upon the steamer. She sighted the schooner at a distance of four miles, again at a distance of two miles, and observed that the schooner was sailing on the wind and so south-easterly. She ought to have presumed that the schooner would pursue the customary track, at that point, of vessels bound eastward, and a proper observation of the actual direction of the schooner's course ought to have warned her seasonably that they were approaching each other on intersecting lines, and that she was bound to regulate her movements in such an emergency to avoid all danger of collision. A timely reduction of her speed, or a slight change in her course, would have accomplished this, but she directed her course, with undiminished speed, to pass between the light-ship and the schooner, and so brought herself in contact with the latter. This was her avoidable mistake, and so she must be held solely accountable for the consequent loss.

The theory propounded by the respondents' counsel does not furnish a satisfactory solution of the problem. It rests upon the hypothesis that the vessels were sailing upon parallel lines, sufficiently far apart not to involve any danger of collision, and that, when they were within three or four hundred feet of each other, the schooner suddenly luffed across the steamer's bow, and thus brought them in contact; but it is unsupported by sufficient evidence, is against the decided weight of evidence in the case, is inherently improbable, and, in the judgment of experienced seamen, is perhaps entirely impracticable.

There must be a decree for the libellants, and a reference to a commissioner to ascertain and report the damages.

## THE ALCONA.

(District Court, E. D. Illinois. 1881.)

## 1. GENERAL AVERAGE.

Where a vessel, in the course of her voyage, becomes stranded upon the bank of a river or harbor, and the circumstances are such as to show there is no danger to be apprehended from her lying there, the expense of getting her off is not the subject of a general average contribution.

## In Admiralty.

This was a libel *in personam* by Charles Bewick *et al.*, owners of the propeller Alcona, against the Detroit Fire & Marine Insurance Company, to recover for a general average contribution. The policy insured the propeller against total loss and general average only in the sum of \$10,000. The answer denied that the libel set up a proper claim for general average. By a stipulation of facts it appeared that the Alcona, with a cargo of 37,000 bushels of corn, left Toledo, Ohio, for Buffalo, and while proceeding down the Maumee river, when on the range stakes, brought up on the bottom, and was unable to get off without assistance; that she lay about 20 feet outside of the channel; that while she was thus stranded it was deemed advisable to lighten her of a portion of her cargo, and accordingly about 5,000 bushels were removed from the propeller to a barge, and the propeller was then floated by the assistance of the propeller Alpena and certain tugs.

Otto Kirchner, for libellants.

F. H. Canfield, for claimants.

Brown, D. J. So far as the facts of this case are concerned, I am satisfied that there is no evidence which would be proper to go to a jury that the Alcona was in any danger of total loss or serious damage to herself or cargo. There is no allegation to that effect in the libel. She lay upon an even keel, upon a bank of sand, clay, and mud, several miles from the mouth of the Maumee, protected from the heavy winds and sea of the open lake. A rise in the water would have floated her off without assistance, and it was very improbable that any such fall would occur as would put her in any serious peril. She was a little out of the channel, and there was plenty of room for other vessels to pass without fear of collision. The weather was good, and for all that appears she was as safe as if she were lying at her own dock. Nor should I be justified, from the testimony, in finding the existence of a usage of insurance companies to treat expenditures of this kind as general average. It is true that evidence was offered tending to show that in a number of similar cases, running through a series of years, expenses incurred under like circumstances had been allowed; but there is nothing to show a uniform and certain

usage to that effect. A custom cannot thus be proved by isolated cases. *Cope v. Dodd*, 13 Pa. St. 33.

We are, then, left to deal with the naked question whether expense incurred in getting off a vessel stranded in a place of safety can be the subject of a general average contribution. Cases in which steam-power is employed in hauling off stranded vessels are not strictly cases of general average, but are treated in the books as rather in the nature of general average. The law upon this subject originated in cases of jettison, and most of the earlier cases relate to actions brought to recover contributions for goods thrown overboard, or masts, cables, or rigging sacrificed to relieve vessels in distress. After the invention of steam-power the same principle was extended to expenses incurred for tugs hired to haul off stranded vessels from a dangerous shore; but I do not understand that the general principle upon which allowances of this kind are made has been at all enlarged in this new class of cases; and I apprehend the expense of tugs for this purpose would not be allowed in any case where, if other equally prudent and efficacious measures of relief had been adopted, (such, for example, as a jettison of a part of the cargo,) the losses thereby voluntarily incurred would not be held the subject of a general average contribution. It would be unreasonable to say that a vessel in peril may select one method of relief and obtain an allowance by way of general average, while, if she selects another method of accomplishing the same thing, the loss would be hers alone. Hence it seems to me quite clear that we must look only to the circumstances in which this vessel was placed, and not to the particular measures employed, to determine whether the case is a proper one for contribution.

Now, referring to the authorities upon the subject, I take it that nothing is better settled than that a voluntary sacrifice of a portion of the vessel and her cargo can only be justified to save the remainder from an imminent danger of loss.

In 2 *Arnold, Insurance*, 883, it is said: "It is an undoubted requisite of general average loss that it should have been incurred under pressure of a real and imminent danger." And at page 884 it is said: "The sacrifice must have been made under an urgent pressure of some real and immediately-impending danger, and must have been resorted to as the sole means of escaping destruction."

In the case of the *Columbian Ins. Co. v. Ashby*, 13 Pet. 331, in which it was held that the voluntary stranding of a ship in imminent peril

constitutes a case of general average, Mr. Justice Story remarked that—

"The Roman law fully recognized and enforced the leading limitations and conditions to justify a general contribution, which have ever since been steadily adhered to by all maritime nations: (1) That the ship and cargo should be placed in a common imminent peril; (2) that there should be a voluntary sacrifice of property to avert that peril; and (3) that by that sacrifice the safety of the other property should be presently and successfully attained. Hence, if there was no imminent danger, or necessity for the sacrifice, as if the jettison was merely to lighten a ship, too heavily laden by the fault of the master in a tranquil sea, no contribution was due. The contention of libellants, that the expenses incurred in this case were for the joint benefit of the ship and cargo, (because the voyage might otherwise have been indefinitely prolonged,) is expressly declared in this case to be no ground for a general average contribution. It may be said that unless the ship is got off the voyage cannot be performed for the cargo, and the safety and prosecution of the voyage are essential to entitle the owner to a contribution. But this principle is nowhere laid down in the foreign authorities; and certainly it has no foundation in the Roman law. It is the deliverance from an immediate, impending peril, by a common sacrifice, which constitutes the essence of the claim. \* \* \* But, in truth, it is the safety of the property, and not of the voyage, which constitutes the true foundation of general average."

In the subsequent case of *Barnard v. Adams*, 10 How. 303, it is said that "in order to constitute a case for general average, three things must concur, the first of which is a common danger; a danger in which ship, cargo, and crew all participate; a danger imminent and apparently inevitable, except by voluntarily incurring the loss of a portion of the whole to save the remainder." Subsequent cases in the same court reaffirm the same principle. *The Hornet*, 17 How. 100; *The Ann Elizabeth*, 19 How. 162; *The Star of Hope*, 9 Wall. 203.

In his work on General Average, Mr. Lowndes states, as a fundamental rule, p. 4: "That after the cargo is in safety, the benefit it may derive from being carried in the ship to its place of destination, is not a ground for making it contribute towards the cost of repairing the ship, nor placing the ship in shape where she can be repaired;" citing *Powell v. Gudgeon*, 5 M. & S. 431, and *Sarguy v. Hobson*, 4 Bing. 131; *Duncan v. Benson*, 1 Exch. 537; 3 Exch. 644; *Job v. Langton*, 6 E. & B. 779.

None of the cases cited by libellants look towards any relaxation of the rule that imminent danger to the ship and cargo is an ingredient essential to a general average contribution.

In *Birkley v. Presgrave*, 1 East, 228, it was merely decided that an action of *assumpsit* would lie by the owner of the ship to recover from the cargo its proportion of a general average loss; but the declaration in that case expressly alleged that the sacrifice was necessarily made in order to preserve the ship and cargo from perishing by storm.

In *Thornton v. U. S. Ins. Co.* 12 Me. 150, which was an action upon a policy of insurance, it appeared that the vessel, being on a voyage from Richmond to Bremen, was compelled to put into Cuxhaven, an intermediate port, for the preservation of the ship, cargo, and lives of the crew. So in the *Bedford Ins. Co. v. Parker*, 2 Pick. 1, it appeared that the vessel struck on a reef of rocks outside the harbor of New Bedford, at the distance of about nine miles from the town, but within 80 or 90 yards from the shore, and was in imminent peril from the sea, the tide flowing into and out of her, and filling the hold. The question was whether iron taken off the ship before the ship itself was gotten off was subject to contribution. In the case of *McAndrews, v. Thatcher*, 3 Wall. 347, the same question was considered, and Mr. Justice Clifford expressly says:

“It cannot be doubted that the ship and cargo were jointly exposed to a common peril, and were in imminent danger of being wholly lost. Such being the fact, it is clear that the expenses of saving the ship and cargo were a proper subject of joint and ratable contribution in general average by vessel, freight, and cargo, provided the vessel and cargo were saved by the same series of measures during the continuance of the common peril which created the joint necessity for the expense.”

The continental writers are equally explicit to the point that imminent peril of loss is an essential ingredient in a claim for general average. Says Goirand, in commenting upon article 400 of the French Commercial Code:

“Four conditions are indispensable to general average, the absence of any one of which suffices to render the average particular. In order that the average be general, it is necessary (1) that the damages or expenses arise from the voluntary act of man; (2) that such voluntary action has had for object to save the ship and cargo from immediate danger of loss; (3) that such danger has equally menaced both ship and cargo; (4) that the voluntary sacrifice has been attended with beneficial results,—that is to say, has led to the preservation of the ship and cargo.”

The civil-law courts are even stricter than ours in requiring a previous consultation with the crew, and parties interested in the cargo who may be on board. A report of the deliberation must be drawn

up, specifying the motive of the jettison, and enumerating the articles thrown overboard or damaged. This is signed by the persons who took part therein, and transcribed into the log-book. At the first port touched at the captain must, within 24 hours after his arrival, attest the statement contained in the deliberation.

So, in the elaborate work of Hoechstet & Sacré, vol. 2, p. 946, it is said:

"The act [the basis of the claim for general average] should be a voluntary act agreed to after a consultation with the crew, and in the common interest. It should be justified by the fear of a peril certain and imminent, and have for its object to prevent a total or considerable loss by a less sacrifice." Page 960: "A jettison is justified only by extraordinary necessities, when it is a question of lightening the ship to prevent her foundering, by relieving her when she is stranded, or of quickening her speed to escape the pursuit of an enemy."

Section 702 of the Dutch Code provides for a case precisely like the one under consideration: "When a ship is prevented, from existing shoals or shallows or banks, from leaving the place of departure, or reaching her place of destination, with her full cargo, and a part thereof must be conveyed to the ship by or discharged into lighters, such lightering is not considered as an average." See, also, Caumont, title, "Avaries," §§ 31, 32, 33. These expenses are, however, allowed where the vessel is obliged to enter the harbor by a storm or the enemy's pursuit. Code of Portugal, art. 1816, §§ 14, 16, 18; Code of Spain, art. 936, § 5; Code of Italy, art. 509, §§ 10, 14; France, art. 400, §§ 7, 8. All of the continental Codes, so far as I have examined them, appear to restrict claims for general average to cases where a voluntary sacrifice is made to save the vessel and cargo from a greater loss. If the allowance of general average can be made in the case under consideration, I see no reason why it is not equally allowable whenever a tug or lighter is employed to assist a vessel over a bar at the port of departure or of destination, or to relieve a vessel whenever and wherever, in the course of her voyage, she may happen to touch the bottom, be her situation never so safe, if she happens to require assistance to get off. Such a ruling would be extending the doctrine of general average to cases never contemplated by any writer upon maritime law, either in Europe or America, to which my attention has been called.

## FLANAGIN v. THOMPSON and others.

*(Circuit Court, D. Maryland. November 7, 1881.)*

## 1. RES ADJUDICATA—ESTOPPEL.

Two mortgages of different properties were at the same time assigned to a bank by a wife as security for one note discounted for her husband. Afterwards, in a proceeding in a state court for the foreclosure of one of the mortgages, the wife disputed the validity of the assignment, and resisted the claim of the bank to receive the money arising from a sale of the mortgaged property. The issue thus raised was decided by the state court in favor of the bank, and the validity of the assignment to it was sustained. Subsequently a proceeding to foreclose the other of the two mortgages was instituted in the federal court, and the wife raised the same objection to the validity of the assignment to the bank. The bank pleaded that the question of the validity of its assignment was *res adjudicata*. Held, on the authority of *Campbell v. Rankin*, 99 U. S. 263; *Cromwell v. County of Sac*, 94 U. S. 351; and *Davis v. Brown*, Id. 423, that although the subject-matter of the case in the federal court was not the same as that of the case in the state court, yet the matter put in issue having been the same, and the parties to the controversy the same, that the wife was estopped from again contesting the validity of the assignment upon the same ground as she had set up in the first case.

## In Equity.

*William Sheppard Bryan*, for complainant.

*John H. Handy*, for defendants.

MORRIS, D. J. This bill is filed by Margaretta M. Flanagan, wife of William S. Flanagan, a citizen of Pennsylvania, against Hedge Thompson, a citizen of Maryland, and the Easton National Bank of Maryland.

The bill alleges that the defendant Thompson in 1867 executed a mortgage of land in Maryland to secure a bond for the payment of \$5,000, which bond and mortgage, by proper assignments, had become the property of the complainant, and that, except the sum of \$1,000, no part of the money intended to be secured had been paid, but that the same was long overdue and the mortgage in default. The bill further alleges that the Easton National Bank of Maryland has possession of the bond and mortgage, and sets up a claim to the same by virtue of a pretended assignment, which the complainant charges is null and void. The bill prays that the pretended assignment to the bank may be annulled and set aside, and that the mortgage land may be sold for the payment of the mortgage debt. The bank, by its answer, asserts the validity of the assignment to it, giving the history of the transaction by which it acquired the mortgage, and also, in an amended answer, pleads, in bar of the action, that the same matters put in controversy by the bill had been adjudicated by the court of appeal of Maryland in a cause between the same parties. The mortgagor makes no defence. He admits that the mortgage is in default and that the title of the bank is valid.

The facts disclosed are:

That Mrs. Flanagin, the complainant, in 1872, was the owner of two mortgages on land in Talbot county, Maryland, viz., the one mentioned in this suit which may be called the "Thompson" mortgage, and another which may be called the "Johnson" mortgage. Her husband being pressed for money, she, at his request, assigned in blank both of these mortgages and the bonds they were intended to secure, and gave them to him to be disposed of. Failing in an effort to sell them outright, he applied to the Easton National Bank to loan him \$7,000 on them as collateral security. This the bank agreed to do on condition that he should execute a note payable at six months, with two other persons as sureties. He did execute such a note for \$7,000, dated December 16, 1872, at six months, payable at a bank in Philadelphia, and over the complainant's signature on each mortgage was written:

"I hereby assign, transfer, and set over the within mortgage and the accompanying bond, with all interest thereon, to the president, directors, and company of the Easton National Bank of Maryland, as collateral security for the payment of a note discounted December 16, 1872, in favor of William S. Flanagin, for \$7,000, indorsed by R. D. Johnson and Hedge Thompson."

The mortgage and bonds were then delivered to the bank's attorney, and Flanagin received the proceeds of the discounted note. Before this note became due Flanagin notified the bank that he would not be able to pay it at maturity, and asked for a renewal with the same collaterals and sureties. The bank granted his request and consented to renew, but informed him that as the note had been placed in a Philadelphia bank for collection he must take it up there. This he did, and a few days afterwards went from Philadelphia to Easton, and there received the proceeds of the renewal note. Thereafter renewals were granted to him by the bank, upon his solicitation, every six months until March, 1876, when the note then maturing laid over and remains unpaid.

Of the two mortgages thus assigned to the bank, the Johnson mortgage was a second mortgage, and in 1876 Ridgaway, the holder of the first mortgage, filed his bill on the equity side of the Talbot county court, making Flanagin and his wife, the bank, and other persons having an interest in the land, defendants, and obtained a decree for a sale. A sale was made by a trustee, and after paying the Ridgaway claim there remained a balance in his hands applicable to the payment of the second mortgage. Mrs. Flanagin then claimed that balance, and for the first time disputed the title of the bank, and insisted that, as the mortgages were pledged to secure a particular note of \$7,000 of a certain date, described in the written assignment indorsed on the mortgages, and as that particular note had been paid, the bank could not hold the mortgages as security for notes subsequently discounted, to secure which she had never authorized them to be pledged, nor ratified the pledging of them. She claimed that the balance of the fund after paying the first mortgage should be audited to her, and not to the bank. This claim was resisted by the bank, and the issue was raised by proper exceptions to the accounts of the auditor distributing the fund, and was passed upon by the county court. The court's order is to be found in the record filed in this case, and in this language:



"The sole question to be determined in this cause is whether the proceeds of sale applicable to the Flanagan mortgage should be awarded to Mrs. Flanagan, or to the Easton National Bank. I am satisfied from the evidence that William S. Flanagan, on the sixteenth of December, 1872, with the consent and by the authority of his wife, Mrs. M. M. Flanagan, deposited said mortgage, and accompanying bond, as collateral security for the payment of a note for \$7,000, discounted for him by said bank on that day, and also that the note, in these proceedings mentioned, is a renewal of said note. It is thereupon, this eleventh day of March, 1880, ordered," etc.

The order overrules the exceptions of Mrs. Flanagan to the account awarding the fund to the bank, and directs the trustee to pay the bank. From this order Mrs. Flanagan appealed, and the record having been transmitted to the court of appeals of Maryland and the case having been heard there, the order of the county court was affirmed. The opinion of the court of appeals is in the record, and leaves no room for doubt but that the same question was considered and adjudicated by that learned tribunal. In the opinion of the court it is said:

"The question for decision in this case arises upon the auditor's reports distributing the proceeds of sale of certain real estate, and this contest is over the right to the balance of purchase money in the hands of the trustee after paying first liens. At the hearing all the other objections were waived except the one affecting the right of the Easton bank to claim the fund as against the appellant. The appellant claims as mortgagee of the land. The appellee claims on the ground that appellant's mortgage and the bond which the mortgage secured were assigned to the bank as collateral security for a note of appellant's husband and others, which has not been paid."

After very fully discussing the facts with regard to the renewals of the note, and the law applicable to them, the court holds that the transaction was not a payment of the first note, but was an extension of credit, and simply a renewal of the loan; that the parties never intended to pay the first note, and that it never had been paid.

The court, as a further ground for affirming the judgment below, held that as Mrs. Flanagan had indorsed the bond and mortgage in blank, and given them to her husband to dispose of, she had put it in his power to pledge them for each of the successive renewals; and, as she had actual knowledge that he had obtained the loan from the bank on a pledge of them, and made no objection until the auditor's account was stated, she could not then be heard to object.

The bank now contends that the foregoing judgment is conclusive of the issue raised in the present case.

The complainant contends that the subject-matter of the controversy is not the same; that the evidence adduced is not the same; and that, therefore, the doctrine of estoppel by *res adjudicata* cannot apply.

The question of what requisites are essential to render a judgment in one case conclusive in another case, has been of late years very frequently before the supreme court. That court uniformly has held that it was sufficient, if, in the first case, the same question or matter in dispute had been necessarily in issue and decided between the same parties. Thus, in *Campbell v. Rankin*, 99 U. S. 263, it is said:

"Whatever had been the opinion of other courts, it has been the doctrine of this court in regard to suits on contracts, ever since the case of *Steam-packet Co. v. Sickles*, 24 How. 333, and, in regard to actions affecting real estate, since *Miles v. Caldwell*, 2 Wall. 35, that whenever the same question has been in issue and tried and judgment rendered, it is conclusive of the issue so decided in any subsequent suit between the same parties; and also that where, from the nature of the pleadings, it would be left in doubt on what precise issue the verdict or judgment was rendered, it is competent to ascertain this by parol evidence on the second trial. The latest expression of the doctrine is found in *Cromwell v. County of Sac*, 94 U.S. 351; *Davis v. Brown*, 94 U.S. 423."

In the present case, while it is true that this suit is instituted to foreclose the Thompson mortgage, and that the previous suit was one to foreclose the Johnson mortgage, and therefore the subject-matter of the suits is different, in neither case has there been any controversy over the validity of the mortgage; the sole controversy has been between Mrs. Flanagan and the bank, and as to whether the bank had a right to retain the mortgages as security for the \$7,000 now due it. The assignments and transactions on which the bank bases its claim have all affected both mortgages precisely alike. If the first note of \$7,000 was in legal effect paid, and if in that case the husband never had authority to pledge the mortgages for the subsequent notes, then the bank had no claim to retain them, nor to receive any part of the proceeds of the mortgaged land in the first case, and has none in this case. The claim of the bank being founded on precisely the same title in both cases, it is evident that the complainant cannot succeed in this case without impeaching the correctness of the decision of the court of appeals, rendered in a case in which the same parties were litigants over the same question.

It is error to suppose that because the two suits concern different subject-matters, the first cannot be conclusive of the second. On the contrary, the supreme court has repeatedly held that notwithstanding the two suits have proceeded upon different causes of action, if in the first the same matter of fact was put in issue between the same parties, and was a necessary ground of recovery, it is a final adjudication of that fact and is an absolute estoppel in the second suit. Thus, in *Cromwell v. County of Sac*, on page 352 of the opinion of the court, it is said:

"There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different cause of action. \* \* \* The language, therefore, which is so often used, that a judgment estops, not only as to every ground of recovery or

defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties, in proceedings at law, upon any ground whatever. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all these cases, therefore, where it is sought to apply the estoppel of a judgment, rendered upon one cause of action, to matters arising in a suit upon a different cause of action, the injury must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. The difference in the operation of a judgment in the two classes of cases mentioned is seen through all the leading adjudications upon the doctrine of estoppel. Thus, in *Outram v. Morewood*, 3 East, 346, the defendants were held estopped from averring title to a mine, in an action of trespass for digging out coal from it, because, in a previous action for a similar trespass, they had set up the same title and it had been determined against them. In commenting upon a decision cited in that case, Lord Ellenborough, in his elaborate opinion, said: 'It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself, in an action of trespass, is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact, which, having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them.' And in *Gardner v. Buckbee*, 3 Cow. 120, it was held by the supreme court of New York that a verdict and judgment of the marine court of the city of New York, upon one of two notes, given upon a sale of a vessel, that the sale was fraudulent, the vessel being at the time unseaworthy, were conclusive upon the question of the character of the sale in an action upon the other note, between the same parties, in the court of common pleas."

See, also, the cases cited by Mr. Justice Clifford in his dissenting opinion, page 365.

In the face of these controlling decisions, it is useless to contend that the determination of a question directly involved in one action is not conclusive of that same question in a second suit between the same parties upon a different cause of action. It is, indeed, a qualification of this doctrine that if a particular and distinct defence, which might have been made in the first case, was not made at all, was not put in issue and passed upon, then, in another suit between the same parties, upon a different cause of action, the defendant would not be estopped from raising that new issue. The above-cited cases of *Cromwell v. County of Sac*, and *Davis v. Brown*, are con-

clusive to this effect. In the latter case the defendants, being sued on two of a batch of ten promissory notes, all of which they had indorsed and transferred to the plaintiff at the same time, defended solely upon the ground that their liability as indorsers had not been fixed by due prosecution against the makers of the notes. This defence was not sustained, and judgment went against them. In a subsequent suit by the same plaintiff on others of the notes, the same defendants rested their defence on a written agreement of the plaintiff, made at the time all of the notes were transferred, that they should not be held liable for any of them. This, the supreme court decided, they had a right to do, and on page 428 of the opinion it is said:

"Where a judgment is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter at issue and determined in the original action, and such matter, when not disclosed by the pleadings, must be shown by extrinsic evidence."

But it is plain that no new defence against the claim of the bank has been made, and that no different matter has been put in issue in the present case. The controversy is the same and the issues are the same.

It is, however, urged that the testimony is not the same, and that there is now more evidence for the complainant than in the case which went up to the Maryland court of appeals. Particularly, that there is now evidence tending to show that Mr. Flanagan had no authority from his wife to pledge the mortgages, but only to sell them; and that, although she knew of and ratified his pledging them for the note of December 16, 1872, she did not know of and did not ratify his acts as to any renewals of that note.

The obvious answer to this is: *First*, that as the court of appeals determined that the first note was never paid and that the collaterals pledged for its payment were still bound for it, the want of authority to pledge for the renewals, or the absence of ratification by the wife in respect to such renewals, are now entirely immaterial matters, and that finding of the court of appeals is conclusive of the complainant's whole case; *second*, that the question of the husband's authority over the bonds and mortgages, and his right to pledge them for the renewals, was in fact put in issue and was decided by the court of appeals. The husband did testify in that case as to his authority, and the purpose for which the bonds and mortgages were indorsed in blank and given to him, so that it appears that matter was in

issue, and from the opinion of the court of appeals it clearly appears the court so considered it and passed upon it.

That Mrs. Flanagin may be now advised that she did not in the first case bring forward all the evidence she had to support her side of that issue, of course, cannot now be heard as an objection to the estoppel, even if it were an issue in any way material after the adjudication of the court of appeals on the first point. *Smith v. Town of Ontario*, 4 FED. REP. 386.

In my judgment the complainant's bill must be dismissed.

*Hopkins v. Lee*, 6 Wheat. 109; *Bank of U. S. v. Beverly*, 1 How. 134; *Miles v. Caldwell*, 2 Wall. 35; *Beloit v. Morgan*, 7 Wall. 619; *Corcoran v. Canal Co.* 94 U. S. 744; *Hill v. Nat Bank*, 97 U. S. 450; *Campbell v. Rankin*, 99 U. S. 261.

## BROWN v. PHILADELPHIA, WILMINGTON & BALTIMORE R. Co.

(Circuit Court, D. Delaware. November 16, 1881.)

### 1. PRACTICE—JUDGMENT BY DEFAULT.

Judgment by default for want of an appearance taken off, and the defendant let in to try the case upon its merits, upon it appearing to the court that there has been no negligence or laches upon his part in failing to have an appearance entered; and upon it further appearing that the attorney for the defendant mistook the jurisdiction of the court, and in point of fact endeavored to cause an appearance to be entered in another tribunal—i. e., the superior court of the state of Delaware—in which he thought the suit had been brought.

Summons. Action on the case. Motion to strike off a judgment by default for want of an appearance, or to open the same, so as to let the parties in to a trial on the merits of the case.

*George V. Massey*, for the motion, cited the following authorities:

*Wood v. Cleveland*, 2 Salkeld, 518; *Dobbs v. Paffer*, 2 Strange, 975; *Evans v. Gill*, 1 Bos. & Pul. 52; 1 Tidd, 567; *Conklin v. Haven*, 6 Johns. 126; *Phillips v. Hauley*, Id. 127; *Davenport v. Ferris*, Id. 130; *Burrows v. Hillhouse*, Id. 132; *Platt v. Torrey*, 18 Wend. 572; *Breden v. Gilliland*, 67 Pa. St. 341; *Sterling v. Ritchey*, 17 Serg. & R. 263; *Pennington v. France*, 2 Houston, 417; Rev. Code of Delaware, 603; section 914 Revised Statutes; and a certificate as to the practice in the state courts signed by all the judges of the superior court of the state of Delaware in the following words:

“DOVER, November 5, 1881.

“The practice in the superior court of this state is to take off a judgment by default for want of appearance when the application for that purpose is made without unreasonable delay, and the court is satisfied that the failure of counsel to appear at the return term was not owing to gross carelessness. In such cases an affidavit of counsel is never required, but, if insisted on, the court would order it. They would, however, require to be satisfied that the

defendant believed he had a good defence to the whole or some part of the cause of action. This practice, we believe, has always prevailed in this state, and rests in the sound discretion of the court. The second paragraph of section 3 of chapter 102 of the Revised Code obliges the court to take off such judgment upon affidavit made in compliance with its requirements, but this has never been understood to affect further the ancient practice. Of course, if execution had been issued upon such a judgment, it would remain cautionary. Chapter 102 is no older than 1852.

"J. P. COMEGYS, C. J.

"JOHN W. HOUSTON, J.

"EDWARD WOOTTEN, J.

"L. E. WALES, J."

—And the affidavit of the president of the road of a meritorious cause of action; of a director of the road upon whom process had been served and who notified counsel; of the attorney of the road that he had mistaken the tribunal and had directed the prothonotary of the state court to enter his appearance in the railroad case *bona fide*, thinking the case was in that court.

*James W. Gray, contra*, relied upon—

Section 914, Rev. St., conforming the practice in the United States courts to that of the state courts, and to the following provision of the Delaware State Code regulating the practice in the state courts, viz.:

"If the defendant in a writ of summons shall not appear at the return-day thereof, and it shall appear by the return that he was duly summoned, it shall be lawful for the plaintiff, having filed his declaration, to take judgment thereon for default of appearance, according to the rules and practice of the court. But if the defendant shall, at or before the next term after such judgment, by affidavit, deny notice or knowledge of such suit before the judgment was rendered, and shall allege that there is a just or legal defence to the action, or some part thereof, such judgment shall be taken off and he shall be permitted to appear; any execution which may have been issued thereon to remain cautionary." Section 3, Del. Rev. Code 1874, c. 102, pp. 633, 634.

BRADFORD, D. J. The facts in the case are as follows:

The plaintiff brought suit to the last June term of this court to recover damages for injuries suffered by him by alighting from a train *en route* through this city and stopping temporarily to permit the passengers to obtain refreshment. The summons was properly issued and served upon the corporation defendant. No appearance was ever entered by defendant, and, upon August 2d last, the plaintiff filed his declaration and entered judgment by default for want of an appearance. At the present October term, on October 19th, the plaintiff obtained an order, in the nature of a writ of inquiry, for the ascertainment of the damages by a jury attending at this term.

Upon this state of facts the defendant moves to-day that the judgment be stricken off the record, and presents the affidavits before mentioned.

Section 914, Rev. St., requiring the practice, etc., in the United States courts, in cases other than equity and admiralty, to conform, as near as may be, to the practice, etc., in like cases in the state courts of the states in which such United States court is held, the first

inquiry will be, what is the practice in this regard in the state courts of Delaware?

Remembering the fact that common-law actions have been judicially tried and determined within the territory now defined by the limits of this state for a period of upwards of 200 years, and that it has been repeatedly held, by the highest courts of judicature within this state, that the common law of England, up to the time of the declaration of independence, is as much a part of our system of jurisprudence as it is that of Great Britain, it will be material to examine the decisions of the common-law courts of that country, and, ascertaining what they are, see how far the statute laws and practice of our own state have modified them, or affected their validity here.

The cases referred to by the defendant's attorney, and running back to the time of William and Mary, all sustain the principle contended for, and recognize the propriety, right, and justice of permitting a judgment by default, be it never so regular, to be taken off if it shall appear to the court that the defendant has a meritorious, just, and legal ground of defence. Indeed, one of the authorities goes so far as to permit the judgment to be taken off, and the case to be tried on its merits, notwithstanding an acknowledgment by the defendant, at the time of the application, of gross carelessness and neglect on the part of the attorney in not entering an appearance. It thus appears that the ancient and uniform practice in England permitted the default to be taken off upon its appearing to the court that the defendant had a just and legal ground of defence. The American authorities cited go to the same point.

If, then, this was the established practice inherited from our English ancestors, and in vogue in our own state up to the time of American independence, to what extent has the statute of Delaware, relied upon by the plaintiff, modified or controverted it? We cannot see that it does so. A careful inspection of the statute in question shows that it makes provisions for a defendant not served by process, and against whom a judgment by default has been entered. He may come in, and, upon making affidavit of the facts, the court must take off the default; but it is silent as to taking off defaults against defendants differently circumstanced. And, in the absence of any express statutory enactments as to other cases, the ancient practice must be held to prevail.

There being no statute provision controverting the ancient practice, is there any modern practice of our state courts in antagonism with it. As we are informed, there is but one reported case, that of

*Pennington v. France*, 2 Houston, 417, and this recognizes and affirms the ancient practice.

Without examining at any greater length into the matter, we may say that all doubt is removed by the certificate presented by the defendant's attorney for the inspection of the court, and signed by all the state judges, declaring what is the practice in the state courts in this regard. This, although it has not the weight of a decision given by these eminent judges while on the bench, in a case duly argued by counsel, and maturely weighed by them in their official capacities, yet is of value as settling the question of practice upon this point in the courts of the state.

Upon an examination of the Delaware statute itself, and giving due weight to the declaration of the judges of the superior court as to the fact as to what the practice is in the superior courts of the state on this point, we have no hesitation in directing that the judgment be set aside, and the defendant let in to try his case upon its merits, upon his pleading an issuable plea, and paying the costs of the suit up to date.

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### BLACK, Trustee, v. SCOTT and others.\*

(Circuit Court, S. D. Ohio, E. D. 1881.)

#### 1. JURISDICTION OF UNITED STATES COURTS—SUITS TO ENFORCE LIENS—NON-RESIDENT DEFENDANTS—SECTION 738, REV. ST.—CONFLICT OF JURISDICTIONS—ASSIGNMENTS FOR BENEFIT OF CREDITORS—PROBATE COURTS.

Bill in equity in United States circuit court by complainants, citizens of states other than Ohio, to foreclose a mortgage upon real estate in Ohio. Before the suit was begun the mortgagor had made an assignment for the benefit of his creditors of all his property, real and personal. The bill made the mortgagor, his assignee, (who was a resident of Ohio,) and others, defendants. The mortgagor and assignee filed pleas to the jurisdiction—the former alleging that he was not a citizen of Ohio, and by reason thereof the court had no jurisdiction; and the latter setting up that he had accepted the trust as assignee, and qualified; that the probate court of Athens county, having exclusive jurisdiction of the trust, had, before the bringing of the suit, ordered him to sell the real estate of the assignor, including that described in the bill; that said order is still in full force, and that he is engaged in executing it; that the real estate is of greater value than complainant's claim, and that the property is insufficient to pay all the indebtedness of said mortgagor; that said real estate was, at the commencement of this suit, in the custody of the law, and subject to the order of said probate court; wherefore the court has no jurisdiction thereof, or of this suit. On demurrer to pleas, *held*:

\*Reported by J. C. Harper, Esq., of the Cincinnati bar.



(1) The plea of the mortgagor is insufficient. Under section 738, Rev. St., he may be served out of the state, or brought in by publication.

(2) The plea of the assignee is also insufficient. The court has jurisdiction to determine the amount due upon the mortgage, and fix the rights of the parties. *Quere*, as to whether it can proceed to sell the property.

In Equity. On demurrer to pleas to the jurisdiction.

*Welch & Welch*, for complainants.

*C. H. Grosvenor, Brown & Koons*, and *John G. McGuffey*, for respondents.

SWING, D. J. The bill states substantially—

That John Scott, on the second day of August, 1875, executed and delivered to Miner T. Ames and John M. Carse his 21 promissory notes, payable to the order of said Ames & Carse, with 8 per cent. interest—interest payable annually; said notes being for different amounts, payable at different dates, the last six of which were for \$1,000 each, and payable November 1, 1877, February, 1878, May 1, 1878, August, 1878, November, 1878, and February 1, 1879; that said Scott, on the day of the execution of the notes, executed to complainant a deed of trust, to secure the payment of said notes; that the four notes due May 1, 1878, August 1, 1878, November 1, 1878, and February, 1879, were, before either of them became due, to-wit, about the tenth day of September, 1877, for a full and valuable consideration, indorsed and delivered by said Ames & Carse to the Humboldt Safe Deposit & Trust Company, a corporation of Pennsylvania, which now holds and owns the same, and about the same time and before the maturity thereof, for a valuable consideration, the said Ames & Carse indorsed and delivered to the National Bank of Chicago, a corporation of the state of Illinois, the note due February 1, 1878, and indorsed and delivered to said John M. Carse, before maturity, and for a valuable consideration, the note for \$1,000, due November 1, 1877, and who are still the owners and holders thereof; that the said John W. Scott, on or about the twenty-third day of October, 1877, made an assignment of all his property to Charles A. Coble, a resident of said Athens county, who has duly accepted such trust and qualified as said assignee; that complainant is a resident of Chicago, and state of Illinois; that John M. Carse is a resident of Illinois; that the Humboldt Safe Deposit & Trust Company is a corporation and resident of Pennsylvania; that the Union National Bank is a corporation and resident of the state of Illinois; that said John W. Scott is a resident of Athens county, Ohio; and that John M. Grace is a resident of Ohio. Several other persons are made parties, all residents of Ohio.

The prayer of the bill is for an account of the amount that may be due on the several notes, and that John W. Scott may be decreed and ordered to pay the same; and that, in default of payment, the real estate included in the deed may be ordered to be sold, as upon judgments and executions at law, for the payment of the same. Subpoenas in chancery were issued, and the marshal returned, as to John W. Scott, "Served on John W. Scott by leaving a true copy thereof

at his usual place of abode, with G. C. Coble, an adult person;" and Charles A. Coble was served personally.

The defendant John W. Scott files a plea to the jurisdiction, in which he alleges that by reason of the fact that he, at the time, nor since the bringing of the suit, was not a citizen of the state of Ohio, this court has no jurisdiction.

The defendant Charles A. Coble files his plea, in which he alleges—That this court has no jurisdiction, because John W. Scott, before the bringing of this suit, had assigned all his property, including the lands in the deed, to him, for the benefit of his creditors; that he accepted the trust, and qualified; that the probate court of Athens county, having exclusive jurisdiction of the trust created by said deed, ordered and adjudged, long before the bringing of this suit, that the defendant should proceed and sell the real estate embraced in the petition in this case, as well as all other, and convert it into money, which order and judgment remain in full force, and binding upon the defendant, and that he was, and now is, engaged in trying to sell said real estate; that the real estate is of greater value than the amount of the complainant's claim; that the property would be insufficient to pay all the indebtedness of said John W. Scott; that the real estate, at the commencement of this suit, was in the custody of the law and of the probate court, subject to its order, and this court had no jurisdiction thereof, or of this suit.

The plaintiff has set down these pleas for argument upon their sufficiency. It is objected by the plaintiff—

That these pleas are insufficient, for the reason that they do not conform to the requirements of rule 31; that a plea shall not be allowed to be filed unless upon a certificate of counsel; that in his opinion it is well founded, in point of law, and supported by the affidavit of the defendant; that it is not interposed for delay, and that it is true in point of fact. Neither of these pleas have the required certificate of counsel or affidavit of the defendant, and would therefore be adjudged insufficient; but inasmuch as the court would permit them to be amended or supplemented in this respect, the plaintiff has consented to their hearing as if they were accompanied by the necessary certificate and affidavit.

We will examine them separately—*First*, the plea of John W. Scott. The allegation of this plea is that at the time, nor any time since, the complainant exhibited his said bill in this honorable court, he was not a citizen of or within the state of Ohio, and therefore the court has no jurisdiction. The first section of the judiciary act provides that no civil suit shall be brought before the circuit court of the United States against any person by any original process or proceedings in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding. The bill alleges that the defendant is a citizen of Ohio, and the return of the marshal is that he was

served by leaving a copy of the subpoena at his usual place of abode, in Ohio. The bill also alleges that the plaintiff is a citizen of Illinois, and it alleges the transfer of the notes for a valuable consideration, before due, to parties who were citizens of Pennsylvania and Illinois; that these notes are due and unpaid, and that since their execution and that of the deed, John W. Scott had assigned all his property for the benefit of his creditors. The bill prays an account, and an order that the defendant Scott pay, and in default that the court order the property to be sold.

Section 738 provides that—

“When any defendant, in a suit in equity to enforce any legal or equitable lien or claim against any real or personal property within the district where the suit is brought, is not an inhabitant of nor found within said district, and does not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer, or demur to the complainant’s bill at a certain day therein to be designated. And the said order shall be served on the absent defendant, if practicable, wherever found; or, where it is impracticable, publication may be made. And, upon proof of the service or publication, it shall be lawful for the court to entertain jurisdiction of such suit in the same manner as if such absent defendant had been served with process within the district. But the adjudication shall affect the property of such defendant within such district only.”

The general nature of this suit is clearly one to enforce a lien against real estate within this district. The plaintiff is a citizen of Illinois, and the defendant, in whom the legal title is vested, is a citizen of Ohio. The court has clearly, then, jurisdiction of the subject-matter, and the party in whom the legal title rests; and the fact that one who may be a proper party may not be an inhabitant of the state or a citizen of it, or may not be found within it, cannot oust the jurisdiction, for under section 738 he may be served personally out of the state, or may be brought in by publication. The plea, therefore, of the defendant John W. Scott is adjudged insufficient.

The plea of the defendant Charles A. Coble substantially states that John W. Scott, before the bringing of the suit, had made an assignment of all his property, including that described in the bill, to him, for the benefit of his creditors; that he had accepted the trust, and had qualified before the probate court of Athens county, Ohio, and had procured an order for the sale of said property, and was proceeding to sell the same; and that by virtue of these proceedings the probate court had acquired complete and exclusive jurisdiction of the subject-matter of this suit, and therefore this court cannot entertain jurisdiction of this cause. The proceedings set out in the plea were

proceedings under the insolvent laws of the state, which provide for the manner of administering property assigned for the benefit of the creditors. Such assignments in nowise affect the legal and equitable liens which existed against the property at the date of the assignment. The persons in whose favor these liens exist are not made parties to the proceedings by the assignee to sell the property, and certainly no orders of the court, affecting their rights, would be binding upon them, unless they were parties thereto. *Ray v. Norseworthy*, 23 Wall. 128. The plea does not allege that the plaintiff was before the court in said proceedings, by being made a party thereto, but it is claimed only that by the proceedings and order of sale the probate court acquired exclusive jurisdiction, so that this court has no jurisdiction to maintain this suit. It is certainly very clear that all the elements of jurisdiction of the circuit court of the United States are alleged in this bill. It is a controversy between citizens of different states. The amount exceeds \$500, exclusive of costs. The real estate and the principal party in interest are in the district in which the suit is brought. None of these allegations are controverted by this plea, but it is sought to defeat the jurisdiction solely upon the ground of the assignment, and the proceedings in the probate court to administer it. The question presented by this plea is not whether, when property has been seized by operation of the insolvent laws of a state, and is being administered by her courts for the benefit of creditors, this court can take possession of the same property and administer it. It has been held by the supreme court of the United States that in such cases the property could not be seized on execution from this court. *Williams v. Benedict*, 8 How. 107; *Bank of Tennessee v. Harn*, 17 How. 160. But it is whether this court, in a case where, by the constitution and laws, it has jurisdiction, can be prevented, by an assignment and proceeding under it, from entertaining jurisdiction and determining the rights of the parties. In each of the last cases referred to, the court recognize the right of the court to proceed to judgment, but determine that no execution could be levied on the property. And there are numerous cases in which jurisdiction has been maintained in the federal courts against administrators, while the estate was in process of settlement by the state courts, the rights of the parties ascertained and fixed, and their satisfaction to be made under the laws of the state. But in this case the property which is sought to be made applicable to the satisfaction of the decree, if one should be rendered, is property which had been set apart by the owner especially for that purpose, and which the assignment could

in no way affect, but upon which the plaintiff has a specific lien; and it was held by the supreme court in the *Union Bank of Tennessee*, 18 How. 503, that "the law of a state, limiting the remedies of its citizens in its own courts, cannot prevent the citizens of other states from suing in the courts of the United States, in that state, for the recovery of any property or money there to which they may be legally or equitably entitled." *Suydam v. Broadnax*, 14 Pet. 67; *Hyde v. Stone*, 20 How. 170. But it is not necessary now to determine whether this court can, in case of a decree in favor of the plaintiff, proceed to a sale of the real estate described in the deed for its satisfaction. It is enough to say that the bill prays an account, and for a decree for the amount which may be found due, and for this purpose it is very clear to us that this court has jurisdiction, notwithstanding the proceedings in the probate court. *Union Bank of Tennessee, supra*; *Payne v. Hook*, 7 Wall. 425; *Yonley v. Lavender*, 21 Wall. 276. This plea must, therefore, also be adjudged insufficient.

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STEVENS v. RICHARDSON and others.

(Circuit Court, S. D. New York. October 31, 1881.)

1. REMOVAL OF CAUSES—ACT OF 1875, § 2.

Where the plaintiff, in a suit commenced in a state court, has united controversies between herself and citizens of the same state, with others, which can be fully determined as between the parties to them, between herself and citizens of a different state, the latter may have the cause removed under section 2 of the act of 1875.

2. NOTICE—SAME.

No notice prior to the order of removal need be given to the other party.

3. BOND—SURETIES.

The bond need not be executed by the petitioners, but is sufficient if executed by others who are named in it as obligors; if conditioned that the petitioners shall comply with the provisions of the statute; and if it recites that the petitioners have petitioned for the removal; though the obligors are not otherwise called in the bond sureties for the petitioners.

4. VOLUNTARY APPEARANCE.

A party does not lose the right to insist on the removal of the suit by a voluntary appearance.

*John Berry*, for plaintiff.

*John E. Burrill*, for defendants.

BLATCHFORD, C. J. This suit was brought in the supreme court of New York, and has been removed into this court by the defendants Richardson and Stevens, as citizens of Massachusetts, the other

defendants being citizens of New York. The plaintiff is a citizen of New York, and moves to remand the cause. The removal, if made, must be made under section 2 of the act of March 3, 1875, (18 St. at Large, 470.) The only pleading put in in the state court, before the removal, was the complaint. The controversies set out therein are not varied by the petition for removal or by anything now before this court. Stevens and Richardson are trustees for the plaintiff under the will of Paran Stevens. Stevens and Melcher and the plaintiff are executors of said will. Stanfield is lessee of an apartment house in New York, which is part of the trust property under a lease thereof made to him by Stevens and Richardson as such trustees, by the terms of which the rent he is to pay is to be paid by him to them. The complaint alleges that a valid agreement exists between the plaintiff and said trustees that said rent should and shall be paid directly by Stanfield to the plaintiff at New York, and that they insist on having Stanfield pay it to them, and that he refuses to pay it to her.

In addition to alleging a violation of said agreement by said trustees, the complaint alleges that the trustees have wrongfully retained from the rent paid to them moneys claimed to have been paid by them for expenses of suits brought by them against Stanfield to compel him to pay the rent to them, and moneys for commissions, and have refused to pay over to the plaintiff the whole amount of moneys so received from Stanfield, and have wholly failed in the performance of their duties as trustees, and reside in Massachusetts, and have no property in the state of New York, and are of but little pecuniary responsibility, and the plaintiff has suffered great loss and been put to great expense in her efforts to protect herself against the wrongful acts of said trustees. There is other property besides said apartment house held by said trustees under said trust. Founded on the above allegations the complaint prays:

(1) That the trustees be enjoined from collecting from Stanfield the rent of the apartment house, and from receiving and disposing of any moneys as trustees of the plaintiff, and from doing any act as such trustees; (2) that they be required to account as such trustees; (3) that they be removed as such trustees; (4) that some other and competent person or persons be appointed trustee or trustees in their place; (5) that they pay to the plaintiff such damages as she has sustained by their wrongful acts.

Certainly, in the matters which are the subject of those five prayers, there are controversies which are wholly between the plaintiff on the one side and the trustees on the other side. Stanfield is not an

indispensable party to any of said controversies, although he may be a proper party to the suit by reason of his being lessee of the apartment house. Melcher, as executor, has no concern with any of said controversies.

But there are other matters in the complaint. The trust for the benefit of the plaintiff is one for her life, for the sum of \$1,000,000. It has not been completed by the executors. It was for the executors, under the will, to put into the hands of the trustees property to that amount. That has been done only in part. The complaint prays that the executors may complete the trust fund by conveying real estate to the trustees; and that they pay to the plaintiff what may be due to her for interest on the trust fund; and that they pay to her, or for her benefit, out of the estate other moneys which she claims; and that they do not charge against her certain moneys which the estate has paid; and that they be restrained from paying to certain trustees, of certain residuary trusts created by said will, any moneys now in, or which may hereafter come into, their hands as such executors. It also prays that the rent of said apartment house, under the lease to Stanfield, be paid to the plaintiff. There is nothing in any of these allegations which makes Melcher, as executor, a necessary party to any of the said controversies between the plaintiff and her trustees.

Those controversies, as embodied in the said five prayers in respect to the trustees, can be fully determined as between the parties actually interested in them without the presence of either Melcher or Stanfield as a party. If the suit had sought no relief but what is embodied in said five prayers, neither Melcher nor Stanfield would have been a necessary or an indispensable party to those issues. The controversies involved in those five prayers do not cease to be controversies wholly between the plaintiff on the one side and the trustees on the other, because the plaintiff has chosen to embody in her complaint distinct controversies between herself and the executors, or a controversy between herself and Stanfield. Whether there is or is not such a connection between the various transactions set out in the complaint as to make all of the defendants proper parties to the suit, and to every controversy embraced in it, at least in such a sense as to protect the complaint against a demurrer for multifariousness or misjoinder, is a question not affecting the matter of removal. If there was any fault in pleading in that respect it was the plaintiff's. On the question of removal she must abide by the case made by her complaint. The question of multifariousness or misjoinder comes

up after the question of removal is settled. The latter question must be settled now upon the complaint. If, hereafter, under any different phase of the case, it should appear that the cause does not really or substantially involve a dispute or controversy within the jurisdiction of this court, it will be the duty of the court, under section 5 of the act of 1875, to remand it to the state court. The case is one directly within the decision in *Barney v. Latham*, 103 U. S. 205, and it must be held that the case was one for a removal of the whole of the suit by the trustees, even though Melcher or Stanfield, or both of them, may have been proper parties to the suit. There is nothing in the case of *Blake v. McKim*, 103 U. S. 336, which in any manner qualifies any thing decided in *Barney v. Latham*. In that case there was a single controversy between the plaintiff, a citizen of Massachusetts, and three executors, two of whom were citizens of Massachusetts, and one of whom was a citizen of New York, the suit being one to recover the amount of a bond executed by the testator of the defendants. The court held that the case was not removable under either of the two clauses of section 2 of the act of 1875, on the ground that all of the executors were indispensable parties to the suit, and that two of them were citizens of the same state with the plaintiff, and that the suit embraced only one indivisible controversy.

The state court made an order accepting the petition for removal and the bond filed, and ordering the removal of the suit into this court. This order was made without prior notice to the attorney for the plaintiff, and the plaintiff contends that the proceedings for removal were therefore irregular. The act of 1875 does not require any notice. The filing of the petition and bond makes it the duty of the state court to accept them and to proceed no further in the suit. In the present case the petition and the bond were filed on the twenty-seventh of July, 1881, and the court on that day accepted them without requiring any previous notice. As was said by this court in *Wehl v. Wald*, 17 Blatchf. 346: "If, as matter of discretion, a state court can or does require notice in any case of removal, such notice was dispensed with in this case by the state court; and, the matter being one of practice, it is for the state court to regulate its own practice, and this court will not review such a question." It has always been held in this court that no notice was necessary. *Fisk v. Union Pac. R. Co.* 8 Blatchf. 243, 247.

The bond for removal is not executed by Stevens and Richardson, nor does it name them as obligors. It is executed by two other persons, who are named in it as obligors. It recites that Stevens and



Richardson have petitioned for the removal of the suit, and is conditioned that they shall do what the statute requires. The obligors are not otherwise called in the bond sureties for Stevens and Richardson. The plaintiff contends that, as section 3 of the act of 1875 says that the petitioner for removal is to "make and file" the bond, the bond is void and the removal invalid. This objection is not tenable. The statute is satisfied, as to the bond, if a bond with sufficient surety is filed. The petitioner for removal makes the bond, in the sense of the statute, if he offers it to the court as the bond required. By section 639 of the Revised Statutes he was required to offer good and sufficient surety. The act of 1875 means no more. Aside from this, a new bond, running in the name of and executed by Stevens and Richardson as principals, and the former sureties as sureties, was filed in the state court on the twenty-eighth of September, 1881, that court having made an order on the twenty-second of September that it be filed there *nunc pro tunc*, as of July 27th. A copy was filed in this court October 1st. The first day of the next term of this court, after July 27th, was October 17th. The notice of motion to remand was not served till October 3d. Nothing to affect the *status* of the suit was done in the state court from July 27th to October 1st. The objection as to the bond is overruled.

It is also objected that Stevens and Richardson voluntarily appeared in the state court without the summons being served upon either of them; that, therefore, they were not in court, and no action was pending as to them; that their voluntary appearance was a submission to the jurisdiction of the court, and a waiver of their right of removal; and that they also waived such right by obtaining in the state court an extension of their time to answer, and by giving notice of a motion in said court to dissolve a temporary injunction, which that court had granted, restraining them from collecting any rent from Stanfield, and from doing other acts as trustees. There is no force in these objections. A plaintiff, who brings his suit voluntarily, has a right to remove the cause under the same statute. The trustees were called on to appear and defend their trust by the bringing of the suit and the issuing of the injunction, and they lost no right of removal by saving to the plaintiff the trouble, expense, and delay of bringing them in compulsorily or by doing what they did.

The defendants move that the plaintiff replead in this court. It is not so entirely clear that there are causes of action at law set forth in the complaint which are so separate and distinct from the equita-

ble causes of action set forth as to make it proper now; on this motion, to compel the plaintiff to divide the suit into a suit or suits at law and a suit or suits in equity. If this is to be done at all, it should be done only as the result of pleading. The same remark applies to any questions of multifariousness or misjoinder of causes of action or of parties.

I see no sufficient ground in the papers for requiring the plaintiff at present to give additional injunction security to the trustees; and, although the notice of motion includes the giving further security to the executors, there is nothing in the moving affidavits on that subject.

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*In re* HENDERSON.\*

(District Court, S. D. Ohio, W. D. November 11, 1881.)

1. INVOLUNTARY BANKRUPTCY—ACTION FOR RECOVERY OF DEBT—BAR.

A proceeding in involuntary bankruptcy is not one for the recovery of the creditor's debt, but to secure a distribution of the debtor's property among all his creditors; and therefore the prosecution of an action by the creditor for the recovery of his debt is not a bar to his proceeding against the debtor in bankruptcy.

2. SAME—AMENDMENT TO PETITION—NEW ACT OF BANKRUPTCY.

An amendment to the petition charging that the conveyances, which were specifically set forth in the petition, and which were therein alleged to be fraudulent and without consideration, were also made, if there was any consideration, with intent to prefer certain persons to whom the conveyances were made, does not charge a new act of bankruptcy, and should be allowed.

3. SAME—JURISDICTION—NUMBER AND AMOUNT.

That the petitioning creditors constitute one-fourth in number and one-third in amount of the debtor's creditors and indebtedness is not, in the proper sense of the term, a *jurisdictional* fact.

*Ex parte Jewett*, 2 Lowell, 393, followed.

4. SAME—SAME—SAME—REPEAL OF BANKRUPT LAW—"PENDING" CASE.

A proceeding in involuntary bankruptcy was "pending," within the meaning of the act of June 7, 1878, repealing the bankrupt law, when that act went into force, although the required number and amount had not then joined as petitioning creditors; and the court has power thereafter to permit other creditors to join as petitioning creditors.

*Bateman & Harper*, for petitioners.

*Follett, Hyman & Dawson* and *Thos. Millikin*, *contra*.

SWING, D. J. This is a proceeding in involuntary bankruptcy. The second defence of the answer sets up that, after the filing of the

\*Reported by J. C. Harper, Esq., of the Cincinnati bar

petition in bankruptcy, the petitioning creditor began a civil action against the debtor for the recovery of his debt, and had prosecuted the same to judgment, thereby securing a lien upon the defendant's property; and alleges that, by reason thereof, the petitioner is estopped from prosecuting this proceeding. To this defence a general demurrer is interposed.

I think the demurrer is well taken. Bankruptcy proceedings are not instituted for the recovery of the creditors' debt, but to secure a distribution of the debtor's property to all his creditors. Therefore, the commencement, by the creditor, of an action for the recovery of the debt, is not a bar to a proceeding, under the bankrupt law, to declare the debtor a bankrupt. As to what effect, if any, the lien obtained by the creditor in such action is to have against other creditors it is not necessary now to decide. The matters set up do not constitute a bar to the proceeding for an adjudication of bankruptcy, and the demurrer must be sustained.

A motion has been made for leave to amend the petition. The original petition, filed in 1878, set out the conveyance of certain premises by the debtor to his wife through a trustee, and charged that the same was made without consideration and with intent to delay, hinder, and defraud his creditors, and to defeat the operation of the bankrupt act. It also charged a transfer and conveyance of certain personal property to Ayres McCreary, with the same intent. The amendment proposed sets out the same conveyances, but charges that the first, to the debtor's wife, was made upon the pretended consideration of an indebtedness to her, and with intent to *prefer* her and to defraud, etc., as in the original petition; and that the second, to Ayres McCreary, was made with intent to *prefer* him and to defraud, etc. The amendment does not allege what can properly be called a new act of bankruptcy. The act was the transfer of the property. The amendment proposed simply charges a new intent, and should be allowed.

Finally, there is an application on the part of other creditors to join as petitioning creditors. This proceeding was begun March 16, 1878, and it appears that the petitioning creditor does not constitute the requisite one-fourth in number and one-third in amount of the alleged bankrupt's indebtedness. It is claimed that the requisite number and amount is a jurisdictional fact, and that that requirement not having been fulfilled before the repeal of the bankrupt law, the court has no power to permit others to join or to proceed further

in the case. If the proceeding was "pending" when the law was repealed, the court has power to grant the application.

The language of the act of congress is inconsistent with the idea that it intended the court's jurisdiction to depend upon the presence of the required number and amount. Section 5021 of the Revised Statutes, as amended by the act of 1874, (18 St. at Large, 180,) provides that:

"And in all cases commenced since the first day of December, 1873, and prior to the passage of this act, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors be denied by the debtor by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors, with their places of residence and the sums due them, respectively, and shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt. But if such debtor shall, on the filing of the petition, admit in writing that the requisite number and amount of creditors have petitioned, the court (if satisfied that the admission was made in good faith) shall so adjudge, which judgment shall be final, and the matter proceed without further steps on the subject. And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding in cases heretofore commenced 20 days, and cases hereafter commenced 10 days, within which creditors may join in such petition. And if, at the expiration of such time so limited, the number and amount shall comply with the requirements of this section, the matter of bankruptcy may proceed; but if, after the expiration of such limited time, such number and amount shall not answer the requirements of this section, the proceedings shall be dismissed, and, in cases hereafter commenced, with costs."

The bankrupt act provides that the adjudication shall relate back to the time of filing the petition. The section just quoted provides a mode for supplying the requisite number and amount when there was originally a deficiency. Can it be said that congress would make the adjudication relate back to a time when the court had no jurisdiction of the proceeding? In this case there was a petition containing the necessary allegations as to the residence of the alleged bankrupt, his indebtedness, the nature and character of the petitioner's claim, the acts of bankruptcy alleged to have been committed, with accompanying proofs and affidavits as required by the bankrupt law, the defendant was duly served, and this gave the court jurisdiction of the cause. The question was before me in the case of *In re H. Hirsch & Co.*, and I then so ruled. The opinion of Judge Lowell in *Ex parte Jewett*, 2 Lowell, 393, is to the same effect. The court having jurisdiction of the case when the bankrupt law was

repealed, it follows that it was then "pending" within the meaning of the repealing act of June 7, 1878, (20 St. at Large, 99,) and that proceedings thereafter in it are not affected by such repeal.

The applicants present a petition alleging the same acts of bankruptcy charged in the original petition and amendment, and leave is given to file the same.

NOTE. See, also, in support of decision in foregoing case, *Re Duncan*, 8 Ben. 365; *Re Frisbee*, 14 Blatchf. 185; *Perin v. Peale*, 17 B. R. 377; *Lastapes v. Blanc*, 3 Woods, 134; *Re Mendenhall*, 9 B. R. 380; *Re Rebmeister*, 15 Blatchf. 467; *Bump, Bankruptcy*, (10th Ed.) 47-48, 468-469, and cases cited. That the number and amount is a jurisdictional fact, see *Re Rosenfelds*, 11 B. R. 86; *Re Burch*, 10 B. R. 150.—[REP.]

## NEW YORK BUNG & BUSHING CO. v. HOFFMAN.

(Circuit Court, S. D. New York. September 29, 1881.)

### 1. REISSUE—TOO BROAD—INVALID.

Where the original patent is for a particular form of wooden bushing in an iron one, a reissue for any form is broader than the original, and invalid.

### 2. LETTERS PATENT—BUSHINGS FOR FAUCET-HOLES.

Reissued letters patent No. 8,483, for an improvement in bushings for faucet-holes, is invalid.

### In Equity.

*Wyllis Hodges*, for plaintiff.

*Preston Stevenson*, for defendant.

WHEELER, D. J. This suit is brought upon letters patent No. 141,473, dated August 5, 1873, issued to Samuel R. Thompson for an improvement in bushings for faucet holes, and reissued November 12, 1878, in No. 8,483, to William C. McKean, George H. Jackson, and Jefferson Brown, Jr., assignees, and now owned by the plaintiff. The principal defences set up are that the original patent was void for want of novelty; that the reissue is for an invention different from that described in the original; and that the defendant, in what he does, does not infringe. The only anticipations necessary to be noticed are—

The English patent to William Rowland Taylor, dated August 6, 1864, and sealed February 3, 1865, for, among other things, the employment in beer barrels of peg holes, smallest in the middle of the stave, and conical both outward and inward; the patent of the United States to John Ruegg, assignor to J. G. Marriott, No. 70,024, dated October 22, 1867, for a wooden bung,

screwed into an iron casing or bushing, having screw-threads on both its outer and inner circumference, and screwed into the stave of beer barrels; the patent No. 111,352, dated January 31, 1871, issued to Josiah Kirby, for wooden bungs with a hole in the middle, for a vent-tube, filled with a plug, both bung and plug being made with the grain of the wood running horizontally; and the patent No. 123,789, dated February 20, 1872, to Otto Netzan and John F. Heck, for an elastic bushing for faucets, tapering towards the interior of the barrel, both on its outer and inner circumferences, with a shoulder on the inside, at the inner end, to bear against the inner end of the faucet.

The original patent of Thompson was for a wooden bushing having the hole for the faucet smallest in the middle, and conical both outward and inward, screwed into another bushing or casing made of iron, with screw-threads, to be screwed into the barrel. The claims were for the bushing, constructed and arranged as described, and for the combination of the bushing and casing, constructed and arranged as described, for the purposes specified. The specification of the reissue states that "the invention consists, broadly, in a device composed of a rigid sleeve or casing to be inserted within the faucet hole, and provided with a yielding lining;" and the claims are for a compound bushing for faucet holes of barrels consisting of a rigid sleeve or casing, and a yielding lining, as set forth, and the combination of a casing and a lining having a double-levelled internal formation, as shown and described, and for the purpose set forth.

The defendant sells beer in casks, having iron casings screwed into the staves, for the bung, like that in the Ruegg patent, and like that for the wooden bushing in the plaintiff's patent, with bungs having a hole nearly but not quite through them, in the center, filled with a plug to be driven in by a vent-tube, carrying with it the solid portion of the bung opposite, when the barrels are tapped, like the bungs described in patent No. 148,747, dated March 17, 1874, and reissued in No. 5,937, dated June 30, 1874, to Rafael Pentlarge, for an improvement in bungs for casks. When these bungs are so tapped by the insertion of the vent-tube, the remaining portion of the bung, with the iron casing about it, forms a compound bushing of wood within iron, for the vent-tube, similar to that described in the plaintiff's reissued patent for faucets; and the defendant sells the beer in casks provided with such bungs and casings, intending and expecting that the bungs will be so tapped with vent-tubes and used until the beer is withdrawn, and that then the barrels will be returned to be refilled and supplied with new bungs and the process repeated.

It is true, as has been argued for the defendant, that the double-conical hole for the faucet is shown in the double-conical peg hole

in the patent of Taylor, and the rigid casing for the wooden bushing in the iron casing for the wooden bung in the patent of Ruegg, the simple wooden bushing of the reissue in the yielding bushing of the patent of Netzan and Heck, and the wooden bushing of a vent-tube driven through a bung in the patent of Kirby; but still, as argued for the plaintiff, no one of these shows all the elements of this invention as shown in either the original patent or the reissue. None of them had a yielding bushing like one made of wood in an iron outer bushing or casing, forming a compound bushing yielding to the faucet or vent-tube, and rigid and supporting to the barrel, as the plaintiff's bushing and casing is. It is also true, as has also been argued for the defendant, that the defendant does not himself make or use, or vend to others to be used, the whole patented invention of the plaintiff, so but that, if the whole stopped where he stops, there would be no infringement. But it does not stop there. He furnishes the means which afterwards became, and intended they should become, the compound bushing described in the reissued patent, and in that manner directly procured the infringement to be done, if any was done, by those tapping the bungs to draw the beer; and he is himself liable, if any one is, for that infringement. *Wallace v. Holmes*, 9 Blatchf. 65; *Cotton Tie Supply Co. v. McCready*, 17 Blatchf. 291. So the original patent was valid, and the reissued patent is infringed; and the turning question in the case is whether the original patent will support the reissue.

The original patent described a wooden bushing inside an iron one, or a yielding one inside a rigid one, and if the description had been general, as this statement is, it would have covered what the reissue describes and claims broadly. Such, however, is not the case. The original describes the double-conical form of wooden or yielding bushing only, and this form is described to be of the very essence of that part of the invention, and of the combination of which the wooden bushing was an important part. Thompson was not the original inventor of bushings, nor of wooden bushings, nor of iron bushings, for which any patent has been granted underlying all others of either class, so as to give a monopoly of them. He is subsequent to Taylor, Ruegg, and Kirby, and could only have a patent for what was distinguishable from their inventions, and his patent could be valid only for that. *Railway Co. v. Sayles*, 97 U. S. 554. The form of the wooden bushing was an important part of what so distinguished it, and when form is of the substance of an invention, it is not to be disregarded. *Machine Co. v. Murphy*, 97 U. S. 120. Thompson in-

vented a particular form of wooden bushing encased in an iron one, and took a patent for that, describing no other. The reissue is for any form of wooden bushing in an iron one; that is, for an invention not described in the original. If he had discovered, as he now has, that other forms were useful, he might doubtless have had a patent covering them, or, if he had described them in his patent, had a valid reissue covering them; but he did not do either.

Let there be a decree dismissing the bill, with costs.

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BLATHERWICK v. CAREY and others.

(Circuit Court, N. D. Illinois. October 28, 1881.)

1. LETTERS PATENT—HORSESHOES.

The distinctive feature of patent No. 170,809, granted to Nelson J. Blatherwick, December 7, 1875, for an improvement in horseshoes, being a projection beyond the wall of the hoof, made by curving the shoe almost at a right angle from the natural toe, or point of the hoof, to a point nearly as far inward as the widest part of the hoof, so that the inner fore-quarter of the shoe was nearly a right angle, is not infringed by a shoe in which the projection is lacking.

2. ESTOPPEL.

Defendants are not estopped from denying infringement by reason of having at one time acted under a license from the complainant.

In Chancery.

*Merriam & Whipple*, for complainant.

*Wood & Cunningham* and *West & Bond*, for defendants.

BLODGETT, D. J. This is a bill for infringement of patent No. 170,809, granted to Nelson J. Blatherwick, the complainant, under date of December 7, 1875, for an improvement in horseshoes, and reaching back by *caveat* to October 21, 1874. The object of the invention is declared in the specifications to be the construction of a shoe to prevent horses from interfering, and the end is said to be obtained—

“By making the shoe broader and fuller upon the inside than upon the outside, enlarging it at the toe and upon the inside, thus increasing the support for the horse at that point, the effect of which is that in traveling this point is the last to leave the ground, and the tendency is to throw the ankle of the horse outward and away from the opposite leg, instead of inward and towards it, and when the foot leaves the ground it follows this position of the ankle, and is thrown away from rather than towards the opposite leg. When the ankle is in this position the opposite hoof can pass without interfering.”

The drawing (figure 1) shows the inside fore quarter of the shoe carried forward so as to project beyond the wall of the hoof to such an



extent that the projection beyond the hoof would be at least three-fourths of an inch in an average full-sized shoe, and the outside periphery or rim of the shoe is carried back from the point of the projection nearly in a straight line to the beginning of the hind quarter—that is, to the point where the hoof begins to curve in towards the heel; and when a toe calk is used, it is to be located upon the corner or angle thus projected from the inner fore quarter—that is, considerably to one side of the shoe, and coming to or nearly to the outer edge thereof. In other words, the apparent purpose of this device is to practically change the location of the horse's toe from the point of the hoof to this projection inside of the natural toe or forward point of the hoof. The object of the device, and its mode of operation, are quite clearly described by Mr. Powers, complainant's expert, who says:

"The patent shoe is carried forward on its inner side, from the widest part of the foot, in nearly a straight line to and even with the front of the foot, and this forward extension, when the foot tips forward upon the toe in the act of moving, continues the longest in contact with the ground, or leaves the ground last. The effect of this construction and motion is to cause the foot, in its forward progress, to swing or tumble upon this extended point outward, and, to a certain extent, removing the passing foot and leg of the horse from the other leg standing on the ground, thus preventing the moving foot from hitting the opposite stationary one. Each opposite foot, being provided with one of these shoes, in turn tumbles out on this point of the shoe, and thus escapes the other, or does not interfere."

The only questions made in the defence which I deem it necessary to consider are: (1) The construction to be given this patent; (2) whether defendants infringe. The proof shows, and it was admitted on the argument to be true, that horseshoes to prevent interfering had been made and used, long prior to the time when Blatherwick claims to have made this invention, where the inner fore quarter was curved or bent much more sharply than the natural curve of the hoof, and the toe calk placed upon this sharp curve or angle so that the bearing of the toe was upon this calk nearly in a line with the inside bar of the shoe. This is clearly shown by the testimony of John Palmer, A. W. Redner, Thomas Leggett, Michael McNurney, John Trainor, Thomas Cody, and others. Indeed, it may be taken as a proven and an admitted fact in this case that horseshoes, for the purpose of preventing interfering, had been made and used before complainant entered the field, when an attempt, at least, had been made to change the bearing of the toe to a point inside of the natural toe or tip of the hoof.

This inventor did more than this, and made a new and artificial

toe, inside of the natural one, by curving the shoe almost at a right angle from the natural toe or point of the hoof to a point nearly as far inward—that is, towards the other foot—as the widest part of the hoof, and extending back from this point to the heel, so that the inner fore quarter of the shoe was nearly a right angle, rather than a curve corresponding to the shape of the foot. The necessary effect of this shape is to make the angle of the shoe, as I have already said, to project beyond the wall of the hoof, and this projection forms the tumbling point, as Mr. Powers calls it, or point which last leaves the ground in the act of stepping.

In the light of the testimony as to the state of this art at the time Blatherwick made his invention, I have no doubt this projection beyond the wall of the hoof must be deemed the distinctive feature of his patent; and that he evidently intended this should be so is shown by his drawing, figure 1, where the location of the nail-head channel is such as clearly demonstrates that the corner or angle would project beyond the hoof. With this construction of the complainant's patent it is quite evident that defendants do not infringe, for their shoe (complainant's exhibit 1) has no projection beyond the wall of the hoof. It seems to me to be, in all substantial respects, like the shoes made and used by Palmer, Trainor, and others long prior to complainant's invention. It places the toe calk inside the line of the point of the hoof, and thereby transfers the bearing from the toe, but it does not project or bear beyond the line of the hoof.

It is urged that defendants called the form of shoe which they used the "Blatherwick Shoe," and it also appears that defendants at one time held a license from complainant; but this does not amount to an estoppel on defendants to deny infringement, and only proves that for a time at least defendants conceded to complainant the broad claim now insisted on in this case: that the patent covers all shoes where the tumbling point is changed to a point inside the line of the natural toe. Not being now acting under a license, defendants are not bound by any implied admission from the fact of having once taken a license.

I therefore conclude that defendants do not, by the use of the shoe shown in the proof to have been made by them, infringe complainant's patent, and the bill will be dismissed at complainant's cost.

## SHANNON v. J. M. W. JONES STATIONERY &amp; PRINTING CO.

*(Circuit Court, N. D. Illinois. October 31, 1881.)*

## 1. LETTERS PATENT—PAPER-HOLDERS—INFRINGEMENT.

Letters patent No. 217,909, issued July 29, 1879, to Frederick W. Smith and James S. Shannon, for an improvement in paper-holders, are valid and infringed, as to claims, 1, 2, 3, 4, and 7, by the defendant's device.

*Jesse Cox and Homer N. Hibbard*, for complainant.

*N. C. Gridley*, for defendant.

BLODGETT, D. J. This is a suit for injunction and damages for an alleged infringement, by defendant, of patent No. 217,909, issued July 29, 1879, to Frederick W. Smith and James S. Shannon, and which is now held by complainant, for an "improvement in paper-holders." The defence set up is want of novelty and non-infringement. The character and scope of the invention are set out by the patentees in their specifications as follows:

"Our invention relates to that class of paper files or temporary binders adapted, by having separable uniting wires, to allow of the withdrawal of any one of many papers thereon held, or the insertion of papers between those already on file, without disturbing the order in which the others are placed. The object of our invention is to provide a file more prompt and positive in its action, less calculated to tear the papers filed thereon, more convenient of manipulation, and adapted, in its double form especially, to serve as a writing tablet for the lap or desk. It consists in a paper-holder with duplex parallel hinged transfer wires, made from one piece, having the fixed wires and movable wires secured to the same connecting plate, whereby those parts may be separately packed and attached to any desired base-board; in the structure of the puncturing wire; in a felt or plush covering for the bottom of the base-board; in the stop to limit the movement of the hinged wires. Figure 1 is a perspective view of a double or duplex file applied to a tablet, showing the fixed wires as being tubular and the movable wires solid. It also shows the movable or transfer wires formed of a single piece of wire, bent, in its connecting or horizontal position, in the shape of a crank, and hinged near its angles."

Another feature of the device, as described and claimed, is that the fixed and movable wires are attached to a single plate, removable from the tablet, which allows the parts to be separately packed for transportation. The leading idea of this device is the two puncturing spindles, and the transfer wires, so arranged to operate with each other as to form two continuous parallel rings, upon which papers may be held in place, and yet permit the easy opening of the rings for the removal or insertion of a paper, without the displacement of the others. Standards or spindles for holding papers in place are old,

and so, too, was a bent puncturing wire with another wire so arranged as to form with the puncturing wire a ring on which papers could be transferred from the puncturing wire, and a paper removed or a new one placed on the file within the package. This is shown in the Hauxhurst file, one of defendant's exhibits in the case. This file lacks many of the elements of convenience and utility which are obviously furnished by the complainant's file—*First*, it is a hanging file; *second*, it has only one wire. Papers cannot be so easily looked over, examined, or removed, or new ones inserted, as in the other file. It also lacks the feature of ready removability of parts, so as to admit of close packing for transportation. Yet this, as well as the Billow file, and the Buell and Lilley file-holder, shown in the proof, must be held to limit the scope of the complainant's device. But none of the devices antedating the complainant's patent show a practical duplex paper-holder with a tablet, and arranged with more than one parallel ring composed of puncturing and transfer wires, operating together, as shown by complainant's device.

It seems very evident from the proof that these inventors made an improvement in the art to which their device belongs, which, while it may, in some degree, have been suggested, had not been accomplished by any or all their predecessors; and that this was a substantial and useful improvement is shown by the number of paper-holders which have been brought before the public since Smith and Shannon's invention, which in all essential particulars seem to embody their device. The proof shows something over 30 devices, embodying substantially the Shannon device, which have entered the field since his patent went before the public, showing that the public accepted this form of file-binder, or paper-holder, as new and useful beyond anything of the kind before produced; and the proof shows that a large demand at once sprung up for complainant's device, which has continued, except so far as it has been impaired by interfering devices. I therefore conclude that this patent cannot be held void for want of novelty.

Upon the question of infringement there can be no doubt but that defendant's paper-holder contains the same essential elements which have made the complainant's holder a success. The puncturing and transfer wires are so arranged as to form parallel rings. The transfer wires are so joined as to be, for all substantial purposes, the same as those of the complainant. Their mode of operation and effect, their function in the organism, are the same in both devices.

The defendant insists that by the terms of the complainant's pat-

ent his transfer wires must be formed of a "single piece of wire," but the connecting bar between defendant's wire makes them, for all practical purposes, one wire, and I discover nothing in the proof that leads me to conclude that the complainant was, by the state of the art when he entered the field, to be confined to so literal and narrow a construction of his patent as would relieve the defendant from infringement because its transfer wires are made of two pieces of metal instead of one. If the proof showed that other double transfer wires had been made prior to complainant's patent, which performed substantially the function of the complainant's or defendant's transfer wires, then the point might be well taken. But it seems to be a necessity for the operation of these double transfer wires that they shall be so connected together as that the lifting of one will lift the other to the same extent in the same direction so as to retain the parallelism of the rings. And this appears to be most readily accomplished by making the two wires in one piece. But that does not allow an infringer to cut out a section of this wire and insert another piece of metal in the place of that cut out, and then insist that it does not infringe, when the metal inserted performs the same function as that removed. I find, therefore, that defendant's paper-holder infringes the first, second, third, fourth, and seventh claims of the complainant's patent.

The seventh claim is for a stop. A stop is necessary for the proper working of the device in order to prevent the transfer wires from slipping past the points of the puncturing wires, as the transfer wires operate by a spring. If there was not a device for stopping them as they strike on the bevel, they would not make a perfect joint or connection at their point of contact; and therefore the complainant, in his device, has a stop upon his spring, so that the crank, as he calls it, strikes upon the stop and prevents it from passing any further. The defendant has two stops operating substantially the same way in his device, and for the same purpose, although he has arranged them differently; yet they perform the same function, and are, undoubtedly, substantially the same stop, though somewhat differently constructed.

My conclusion, then, is that there is an infringement of this patent shown clearly, and although it is a patent for a device of minor consequence, yet, at the same time, it is just as much entitled to protection as though it was for the most important piece of machinery ever devised. There will be a decree for an injunction, and a reference to ascertain and report profits and damages.

## LAWRENCE and others v. MORRISANIA STEAM-BOAT CO.

(District Court, E. D. New York. October 24, 1881.)

## 1. REPAIRS TO VESSEL—CONTRACT—PERFORMANCE.

L. & Co., shipwrights, made an offer, by letter, to the M. Steam-boat Co. to repair one of their steam-boats, which was accepted, and L. & Co. proceeded to do the work. Payments on account were made while the work was in progress, and a note for the balance of the bill given. Payment of the note at maturity was refused on the ground that the contract had not been fully performed. L. & Co. filed a libel to recover the balance claimed to be due, and the company in their answer set up a special agreement to make the boat stiff and strong as new, and remedy the defect which made her "cranky," and non-performance thereof. *Held*, that the special agreement was not found by the testimony; that the written contract in the letter was the only one by which to determine the right of the parties; and, the terms of that having been performed, the libellants were entitled to be paid the balance due.

In Admiralty.

*Scudder & Carter*, for libellant.

*T. C. Cronin*, for libellee.

BENEDICT, D. J. Upon the testimony there is little room to doubt that the libellant is entitled to recover the portion of his bill for work done upon the defendant's steam-boat, Shady Side, that remains unpaid. The letter of the libellant, dated April 10, 1880, contains a statement of the work he offered to do. The defendants, by their letter of April 14, 1880, accepted the libellant's offer as made. These two letters constitute a written contract by which alone the rights of the parties must be determined. These letters contain nothing in the shape of a warranty on the part of the libellant that the alteration he proposed to make in the boat's hull would make her stiff, and remedy the existing defect in her build, and for that reason it must be held that the special agreement set up in the answer has not been proved. This view of the matter in controversy renders it unnecessary to pass upon the conflicting testimony given in respect to conversations and negotiations had prior to the reduction of the contract to writing. It should, however, be said that the acts of the parties subsequent to the acceptance of the libellant's offer are in harmony with the view I have adopted, and confirm me in the opinion that the libellant has performed his contract and is entitled to be paid the sum claimed in the libel.

Let a decree be entered to that effect.

## TWO HUNDRED AND SEVENTY-FIVE TONS OF MINERAL PHOSPHATES.

(District Court, E. D. New York. November 7, 1881.)

## 1. MARITIME LIENS.

Upon the arrival of the vessel the phosphates in question were seized by the marshal, by virtue of process issued against the property in a possessory action, and sold at auction as it lay. *Held*, that the purchaser had a reasonable time for unloading, but that for any longer detention the master was entitled to demurrage; and that the claim for demurrage constituted a lien upon the property.

In Admiralty.

*Goodrich, Deady & Platt*, for libellant.

*Dan. Marvin*, for claimants.

BENEDICT, D. J. This is an action *in rem* to enforce a lien, claimed by the libellant upon a quantity of mineral phosphates lately on board the brig *Dauntless*, for delay in removing the same from the vessel aforesaid. The facts are somewhat peculiar:

The brig *Dauntless* arrived in the port of New York, from Brazil, laden with the phosphates in question, and was entered at the custom-house on the thirtieth day of July, 1881. Upon her arrival the property was seized by the marshal of this district, by virtue of process issued against it in an action of possession brought by one James C. Jewett, who claimed to be the owner of the property, and that it was wrongfully detained by the master of the brig. In that action the property in question was thereafter sold by the marshal as it lay in the vessel. The terms of sale were as follows: "Cargo of the *Dauntless* to be sold as it is on board, and as 275 tons in weight, and this number of tons to be paid for to the marshal; weight to be determined by the weigh-master's return, and purchaser to pay for any tons over 275 tons; and the marshal will refund the sum per ton for weight short of 275 tons. Bids to be for the ton of 2,240 pounds. The weigh-masters to be appointed by the marshal. Terms, 20 per cent. on day of sale, and the balance to make up the amount of 275 tons weight within three days after and before delivery of any cargo." The sale took place on Wednesday, the eighth day of September. The claimants bid off the phosphates, and paid the 20 per cent. on the spot. On the 13th they paid the balance of the purchase money, and on that day removed 50 tons from the vessel. The discharging continued until the twentieth of September, when all was removed. The master of the vessel claimed demurrage for the detention of his vessel after the eleventh of September, and, being refused, brings this action against the property to recover for such detention.

Upon the trial the claimants endeavored to show an express agreement between them and the master to allow them eight days in which to remove the property, but the testimony has not satisfied me of the

existence of such an agreement. It was also contended that the claimants were entitled to eight days in which to remove the property, by the usage of the port, but the testimony fails to prove the existence of such a usage. Reliance was also placed upon the statutes of the United States (Rev. St. § 2880) as giving the claimants eight days within which to remove this cargo. But the statute has no relation whatever to the duty devolving upon the buyer of this property under the circumstances stated. All that the testimony shows is an understanding between the claimants and the master that, so far as relates to the time of the removal of the property, the vessel should be considered as having just arrived and entered at the custom-house. Upon such facts, the only obligation on the part of the buyers of the phosphates was to perform their implied promise to remove the property from the vessel within a reasonable time, and the right of the libellant to demurrage depends upon the question whether the property in question was removed within a reasonable time from the thirteenth of September, that being the day on which the marshal delivered the property to the claimants. No detention of the vessel prior to that day can be imputed to the claimants, for prior to that day they had no right to remove the property.

Upon the question of what was a reasonable time within which to remove this property, I am of the opinion that with reasonable exertion all could have been discharged by the 16th. This leaves four days to be paid for. Thirty dollars a day is reasonable demurrage, and the amount of the demurrage is therefore \$120.

The next question is whether a maritime lien attached to this merchandise for the amount of the demurrage in question. Here the peculiarity of the case is that the acts complained of which give rise to the claim for demurrage are not the acts of a shipper or of a consignee of the merchandise. The claimants were no parties to the contract of affreightment under which the property had been transported,—if such a contract there was,—but simply purchasers of the property as it lay in the vessel. Moreover, they purchased from the marshal, and must be held to have received the merchandise from the marshal free and clear of any existing encumbrance or charge.

The question presented by this state of facts appears, therefore, at first sight, to be different from the question that arises when the acts complained of are those of a shipper of property, or a consignee of property, under the ordinary contract of affreightment. And yet, in principle, there is no difference; for demurrage is only a reward to the vessel in compensation of the earnings she is improperly



caused to lose. *Sprague v. West*, Abbott, Adm. 554. And as, in the eye of the law, maritime, upon commercial reasons, the master of the ship is deemed to contract, in respect to the freight, rather with the merchandise than with the shipper, and his rights are, therefore, not made to depend upon any doctrine of agency. *Hyperion's Cargo*, 2 Low. 94. So, upon the same grounds, the contract to remove this merchandise—which merchandise, it must be remembered, was the cargo of the brig actually on board as such—should be deemed to have been made with the merchandise as well as with the buyers thereof, and the merchandise, in consequence, is chargeable with the loss arising from the non-performance of that contract.

There must be a decree in favor of libellant for the sum of \$120, and costs.

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THE CHOTEAU.

(Circuit Court, E. D. Louisiana. June, 1881.)

1. SALVAGE.

Salvors cannot force themselves on a vessel against the will of the master.

In Admiralty.

*M. M. Cohen*, for libellants.

*A. Micou*, for claimants.

PARDEE, D. J. In this case I have found no necessity to elaborately find and write out the facts. There is disagreement on only two points: (1) Whether the Choteau rang her bell rapidly for assistance. (2) Did the Protector get her line aboard the Choteau and throw any water on the fire and render assistance? Both of these I find against the libellants. The bell of the Choteau was rung three times for a landing, and was not rung for assistance. The fact is that the Protector's captain, hearing of the fire, and hearing a bell rung, run his boat alongside the Choteau, and attempted to assist in quenching the fire, but his offers of assistance were rejected, and his attempts prevented by the master of the Choteau, who was able and willing to and did take care of his own boat. Salvors cannot force themselves upon vessels in distress against the will of the master. It is at his option to accept their services or not, and if he refuse them compensation cannot be recovered for assistance subsequently rendered against his will. *The Brig Susan*, 1 Sprague, 502. That the sailors have no right to act against the will of the master. *The Dodge Healy*, 4 Wash. 657; *The Bee*, Ware, 332.

When services are rendered without any beneficial results no salvage can be allowed. *Schooner Elvira*, Gilpen, 60; Conkling, Adm. 280; *The Whitaker*, 1 Sprague, 282; *The Dodge Healy*, 4 Wash. 657.

Under this state of facts and these authorities libellants have no claim for salvage against the Choteau, nor do I think that under the general facts of the case libellants are entitled to any allowance for labor and expense in going to the assistance of the Choteau. It was in the port of New Orleans. The Protector's sole business is as a salvage boat. She is owned and run by an incorporation of insurance company presidents for harbor protection. The crew are under pay for such service, with a contract waiving salvage. The boat had steam up, ready to go to any point. The boat is of iron, and neither she nor her crew ran any risk. Besides, in trying to aid the Choteau against the will of her master, the captain and crew of the Protector were violent and aggressive, and apparently disposed to lay the foundation for a salvage claim. See the case of *The Straton Audley*, 3 Maritime Law Cas. 285.

The proctor for libellants has made a vigorous effort to recover costs or to divide them. There is no doubt the question is within the discretion of the court. The good faith of parties should be considered among other matters. In the court below the decision was against the libellants, and the judge seems to have doubted the good faith of the parties from the incipency of the suit, and gave costs as well as judgment against them.

On the appeal this court substantially coincides with the district judge. The claimants have been at considerable necessary, unavoidable expense on account of this action, which has no merit. They should not be saddled with the costs besides.

Let the libel be dismissed, with costs.

See 5 FED. REP. 463.

## THE NAHOR.

*(District Court, S. D. New York. May 21, 1881.)*

**1. COLLISION—LIBEL BY OWNER OF VESSEL FOR LOSS OF CARGO—LIBEL BY OWNER OF CARGO—PETITION TO BE MADE CO-LIBELLANT—ORDER CONSOLIDATING ACTIONS—COSTS—TWO SAIL-VESSELS ON CROSSING COURSES, ONE OF THEM WITH THE WIND AFT—CHANGING COURSE BEFORE COLLISION—LIGHTS—LOOKOUT—VESSEL TO WINDWARD—SEVENTEENTH RULE OF NAVIGATION.**

A vessel, arrested upon the libel of the master and owners of another vessel, who, with the crew, libelled her for loss, by collision, of vessel, cargo, pending freight, and personal effects, having been released, on giving bail for the full amount claimed, is not liable to be again arrested on a libel by the owner of cargo, setting forth the same cause of action as to loss of cargo contained in the first suit. The proper and usual course in such a case for the owner of cargo, if he desires to be made personally a party, is to petition to be made a co-libellant in the first suit. Although an order upon the trial, consolidating the actions, in effect produces the same result, still, the commencement of the second action being improper, the second libellant should be charged with the costs of his action, and the bond given therein should be cancelled without regard to the result of the first suit.

Where the bark N. collided with the libellant's schooner P., about 75 miles south-east of Sandy Hook, about half past 5 o'clock A. M. in November, 1879, striking her on the stern a little to the port of the stern post and causing her to sink, and the P. was sailing on a north-east course, wing and wing, the wind being south-west, and the P. claimed that she did not see the N. until just before the collision, when, to diminish the force of the blow, or possibly to avoid the collision, she immediately changed her course, but not more than two points to port, and that the collision was caused by the N. having no lights, and not luffing to avoid it, and not keeping out of the way of the P.; and the N. claimed her course had been N. W. by N. and not N. by W., as claimed by the P., and that she kept that course and did not change to a more northerly course, as claimed by the P., but that the P. changed her course as much as four or five points, and that the collision was caused by the fault of the P. in bringing herself on a line with the N. instead of keeping out of her way, and in not sooner seeing the N.,—*held*, on the evidence, that the P.'s green light was first seen by the N. distant about a mile, and from two and a half to three points on her port bow, and that the N. was heading at the time N. W. by N. and not N. by W., as claimed by the P. Also *held*, the evidence showing that at the instant of the collision the courses of the vessels diverged about two or two and a half points, that the P. must have changed her course just before the collision more than two points to the port, and as much as four and a half to five points; that the disappearance of the P.'s light from the view of those on the N. after it was first seen was due, not to the alleged change in the course of the N., but to the fact that the P. was not kept steady in her course; that the N.'s port light was kept burning brightly, and could have been seen by the P. as soon as the N. saw her green light; that the collision was due to the fault of the P. in not keeping a good lookout, and in not sooner seeing the N.'s light, and, being to the windward of the N., in not keeping out of her way, as required by the seventeenth rule of navigation; that the N. was not in fault, but kept her course, as she had a right and was bound to do under the seventeenth rule.

In Admiralty.

*L. C. Ledyard*, for libellants.

*H. T. Wing*, for claimants.

CHOATE, D. J. The first of these suits is brought by the owners, master, and crew of the American schooner *Pathway* to recover damages for the loss of the schooner, and her pending freight and cargo, and the personal effects of the master and crew, by a collision with the bark *Nahor*. The libel was filed on the twelfth of November, 1879. The vessel was released on bail, securing the whole amount claimed in the libel. Afterwards, on the twenty-first day of November, 1879, the second libel was filed by the owner of the cargo to recover its value. The cause of action sued upon in the second libel is the same covered by the first libel, so far as that was a suit to recover the value of the cargo. Bail was given also in the second suit. The cases coming on for trial together, a motion of the libellants to consolidate the actions was granted, reserving the question of terms as to costs, etc. It is clear that the vessel, having given bail for the value of the cargo in the first action, and the action being properly brought by the master and owners as carriers, for the loss of the cargo, she was not liable to be again arrested for the same cause of action. The proper and usual course in such a case, if the owner of the cargo desires to be made personally a party to the suit instead of trusting its management to his agents, the master and owners of the vessel, is to petition to be made co-libellant with them. The order consolidating the actions in effect produces the same result; but as the commencement of the action was improper, the libellant Rokes must be charged with the costs of the second action, and the bond given therein must be cancelled without regard to the result of the first suit. The alleged reason for bringing the second suit is that counsel for the owner of the cargo entertained some doubt as to the relative rights of the owners of the cargo and the vessel, in case of an apportionment of the damages between the two colliding vessels. See *Leonard v. Whitwell*, S. D. N. Y. Dec. 12, 1879; *The C. H. Foster*, 1 FED. REP. 733. In any view that may have been taken of the subject, I do not perceive that the position of the owner of the cargo could be any better as libellant in a second suit than it would have been as co-libellant in the first suit, as he could have made himself on motion. In any view of the case the filing of the second libel, and compelling the giving of further security, was improper.

The collision took place about half past 5 o'clock on the morning of November 10, 1879, about 75 miles from Sandy Hook, which bore from the place of collision about N. by W. The schooner *Pathway*

was bound from Virginia to Noank, Connecticut, with a cargo of white-oak timber. The wind was south-west, and she was sailing, just before the collision, wing and wing, on a N. E. or a N. E.  $\frac{1}{4}$  E. course, her fore-boom being off to starboard and her main-boom and two jibs to port. She had a crew of five men, all told, one of whom—the captain's son—was lost overboard at the time of the collision. It was the mate's watch on deck. The mate was at the wheel, and the lookout was stationed on the forward part of the quarter deck, on the port side of the house. The captain and the two other men were below till the alarm just preceding the collision. She was a center-board schooner, of 144 tons and about 90 feet long, and was deeply laden, and making about 6 knots an hour. The bark was on a voyage from Orebick, Austria, to New York, in ballast. She had a crew of 17 men, all told. It was the master's watch on deck, and there were 8 men, including himself, in his watch. She was making a speed of about 10 knots. She had all sail set except studding sails. The night was dark, but without any fog or mist. There was a heavy sea running from a south-easterly direction.

The libel alleges that about 20 minutes past 5 o'clock those on board the schooner discovered what appeared to be the loom of a vessel about two or three points abaft the beam on the starboard side, and immediately after a bark, which was subsequently found to be the bark Nahor, came into sight about two or three points abaft the beam over the starboard quarter of the schooner, very close to said schooner, and heading about for the schooner's bow, and going at a great rate of speed, exceeding nine knots per hour; that said bark was going free, with all sails set, and with the wind on her port side; that when said bark became visible from the schooner it was too late for those on the schooner to do anything to avoid the collision, and the said bark struck the schooner on the stern, about three feet to the port side of the stern post, cutting into her so that she sank in about five hours; that when said bark was close upon said schooner and the impending collision inevitable, and in the effort to diminish the force thereof, the wheel of the said schooner was thrown to starboard, but the course of the schooner was not thereby altered more than two points; that up to the moment when the collision was inevitable, as aforesaid, the said schooner was kept steadily upon her course. The libel charges that the bark had no lights, and no competent lookout; that she did not luff in time to avoid the collision, and did not keep out of the way of the schooner.

The answer alleges that about 5:30 the lookout reported a light on

the port bow; that the captain, not being able to see the light, at once ran forward with his night-glass, on the top-gallant forecastle, and there with his glass saw a small, dim light about four points on the port bow, but at first could not tell whether it was a white or a green light, but in a moment he saw that it was a faint green light, close in, and drawing nearer, and apparently crossing the course of the bark but a short distance off; that he saw that a collision was inevitable if the two vessels kept their courses, and he at once ran aft to the man at the wheel and ordered him to put his wheel to port, but before the order could be executed so as to exert any perceptible influence on the heading of the bark by compass, the bark came in contact with some portion of the stern of the schooner, breaking the jib-boom and some of the head-gear of the bark.

The answer alleges that the bark's lights were properly set and brightly burning; that she had a competent lookout; that her course, from 4 o'clock to the time of the collision, was N. W. by N., and that she kept that course steadily till the collision; that the schooner's course was changed more than two points before the collision, and as much as four or five points. It denies the faults charged against the bark in the libel, and avers that the collision was caused by the faults of the schooner in not keeping out of the way of the bark, and in not going under the stern of the bark or luffing up in the wind; that she had no proper lights, nor a proper and sufficient lookout; that she did not see the bark sooner than she did, and did not keep out of her way as it was her duty to do; that instead of doing so she kept away right under the bow of the bark, bringing herself about on a line with the course of the bark, and that she did not show a torch-light over her quarter and stern.

The testimony from the schooner shows that the mate, who was at the wheel, first saw the bark. He describes what he saw as a small black speck over the starboard davit. He called the lookout to him. The lookout came aft by the wheel and he saw that it was a square-rigged vessel. They were alarmed at the situation, the vessel was so near, and the mate cried out, "Call the captain." The lookout ran down the companion-way, which opened aft on the quarter-deck near the wheel, to call the captain. The captain was awakened by the cry of the mate, and immediately rushed out of the cabin. He had his clothes all on except his hat. When he reached the door of the companion-way the mate pointed out the vessel. He saw that it was a square-rigged vessel, apparently heading for the schooner's bow. In his judgment it was from 200 to 400 feet away. He sprang to the

wheel and ordered the mate to go forward. His first impulse was, he testifies, to port and make the shortest possible line across the bows of the other vessel, and with that view he sung out, "Let go the fore-boom guy;" but in an instant he observed, as he thought, that the bark was keeping off, and that this movement was impossible. Accordingly, he determined to starboard his wheel and go the other way. Before his order to let go the fore-boom guy was executed, he sung out, "No, no; let go the main-boom guy and the main-peak halliards," and turned the wheel to starboard. The order was executed. The main-boom swung in, and just then, as it was going over his head, he looked up and saw the jib-boom of the bark above him. He left the wheel and ran forward, and immediately the bark struck the schooner, cutting the boat which hung on the davits about in halves, and penetrating the stern a little to port of the stern post, breaking the rudder, crowding the stern post and wheel one side, and breaking up the deck nearly to the house and upsetting the compass. The angle at which the bark struck is fixed with an approximation to certainty by the fact that her jib-boom went inside of the schooner's main rigging. The courses of the vessels at the instant of collision diverged about two or two and a half points. The conceded course of the schooner being N. E., it is evident that if the course claimed for the bark, N. W. by N., is correct, and she kept her course, the schooner must have changed four and a half to five points before the collision, and not two points only, as stated in the libel.

The testimony from the bark shows that the lookout reported a light on the port or weather bow; that the master, who was aft, was unable to see it, and went forward on the top-gallant forecastle, where the lookout pointed it out to him, and he saw it with his glass. It was seen by the man at the wheel, and by others of the men on deck. It was a dim light as they saw it, and at first they did not make out its color, but presently it was seen to be green. There is the usual diversity in the testimony as to the number of points on the bow that it bore. The libel says it was about four points. The learned counsel for the schooner has pointed out that if it was four points on the port bow, and the respective courses and rates of speed of the vessels were as claimed by the parties respectively, a collision could not have happened, since the bark would have passed the point of intersection of their courses before the schooner could have reached it, even if she had kept her course. This is a sufficient reason for the conclusion that the statement of about four points in the answer as the angle at which the light was seen, and the estimate of some of

the witnesses from the bark to the same effect, is a mistake and an overstatement. It is quite consistent, however, with the testimony from the bark that the light was seen from two and a half to three points on the port bow, and at that angle a collision was possible. From the circumstance of the dimness of the light, and the fact that its color was undistinguishable at first, I think that the light was seen from the bark about as soon as it could have been seen, and that the judgment of the witnesses that the vessel bearing it was nearly a mile distant when it was first seen, is probably correct. After it was seen to be green, the evidence of most of the witnesses is that it continued to bear at about the same angle on the bow, but to be coming nearer and nearer; that after a time the lights disappeared, and in its place was seen the loom or shadow of sails very near to the bark. The testimony of the witnesses as to the light continuing to have the same bearing is rather indefinite. It was quite evident to those on the bark that the light was the light of a vessel crossing the bows of the bark from port to starboard. When the master had made out the color of the light, he left the top-gallant fore-castle and went aft. The evidence does not sustain the averment of the answer that he ran aft to give an order to the wheelsman. On the contrary, it shows that it was not till he got aft and looked again for the light, and saw the loom of sails in its place in dangerous proximity to the bark, threatening immediate collision, that he gave the order to the wheelsman to port. The testimony of both the master and the wheelsman is that the wheel was not changed before the bark struck the schooner.

It is argued, on behalf of the schooner, that it is inconsistent with the proved or admitted facts in the case that the bark was heading N. W. by N. when she sighted the light of the schooner, and that the only rational explanation of the case is that she was heading as far north as N. by W., and afterwards, when the green light disappeared by the schooner drawing so far forward as to hide it, bringing the bark more than two points abaft her beam, the course of the bark was changed two and a half points further to the north, under the supposition of those on the bark that the disappearance of the light was caused by a change of course on the part of the schooner to port. This theory is ingenious, and enforced with great skill, but I am unable to reject the positive testimony of three credible witnesses who were on the bark, and who testify positively to her course being N. W. by N. Their testimony is not overcome by any proved or admitted facts irreconcilable therewith. The disappearance of the



schooner's light may, I think, be accounted for by the fact that she was not kept steady on her course. The mate of the schooner testifies that it was very difficult to keep her steady; that she ran in the trough of the sea, which was very heavy. He admits that she yawed a point or more each way from her course, and that it required constant movements of the wheel to keep her on her course, and sometimes he had to turn the wheel completely over to bring her back. He testified, also, that the wind was quite unsteady. She was running so nearly at right angles with the course of the bark that it may well be that by her yawing the bark was brought for a brief space of time more than two points abaft her beam, which would obscure her light. It is not necessary, on the facts, to find that this disappearance of the light was for any great length of time. It was shortly before the collision, and about the time the schooner herself came plainly in view to those on the bark; and those on the bark would be very likely not to notice the light if it reappeared after they could see the schooner herself. Indeed, if the witnesses from the schooner observed the bearing of the bark aright, when they first saw her, she then bore more than two points abaft the beam, and the light must have been invisible to those on the bark. I think the testimony of the mate shows that after he caught sight of this bark he was in a state of alarm, and his attention may have been distracted from his proper duties at the wheel, and he may have let the schooner keep off somewhat without being aware of the fact. When the captain came on deck a collision was imminent. He testifies that after taking the wheel he looked at the compass, and that she was on her course, or very near it. His looking at the compass must, under the circumstances, have been a mere hasty glance. It was then a matter of seconds merely before a collision, or before a hair's breadth escape from a collision. I think little reliance is to be placed on such an observation as opposed to the positive testimony of those on the bark, taken in connection with the fact that the bark bore more than two points abaft the beam of the schooner. As to the number of points the schooner changed, the testimony of her captain, taken in connection with the libel sworn to by him, is most unsatisfactory. The libel distinctly admits two points. He swore to that when the facts were fresh in his recollection. On the trial he would hardly admit that she changed at all. This was one of the critical points in the case. This inconsistency is evidence that his mind is so much biased on the subject as to render his judgment wholly untrustworthy, without imputing to him any intention to misstate the facts. I think

it is quite consistent with the testimony that the schooner changed her course four points, or more, perhaps, partly through the carelessness or inattention of the wheelsman, before the captain took the wheel. The other circumstances, relied on as controlling the testimony of those on the bark as to her course, are not sufficiently certain or definite to overthrow the positive testimony of several witnesses. It is argued that N. by W. was the proper course of the bark, and that there was no reason for a change to N. W. by N. at 4 o'clock. But the testimony from the schooner, as well as that from the bark, shows that at 4 o'clock a sudden change in the wind to west, or north-west, was thought to be very probable, and this anticipated change is sufficient to account for a change of course somewhat to the westward of the direct course to Sandy Hook. Other circumstances need not be referred to in detail.

Assuming, then, that the course of the bark was N. W. by N., and that she made the green light of the schooner between two and three points on her port bow, at a distance of a mile or less, it is evident that the schooner was to windward, and, under the seventeenth rule of navigation, bound to keep out of the way, if the bark had her lights set and burning so that the schooner could have then seen her. The next question, therefore, is whether the bark's port light was burning. The four surviving witnesses from the schooner testify that they saw no light on the bark. Two of these witnesses—the captain and the mate's son—did not come on deck till after the captain was called. The bark herself was then in sight, and it is no unusual thing, nor should it excite surprise, that persons seeing the other vessel only immediately before the collision, and when she is herself quite visible to them, do not notice whether or not she has lights. Their attention was instantly drawn to the vessel herself, her sails and hull, and the manner of her approach. As to the mate and the lookout this is true in a far less degree, but still the lookout certainly made out the object to be a vessel as soon as he looked at it.

The mate testifies to seeing a black speck before he called the lookout, though the libel contains nothing of this, but rather gives the impression that what they first saw was what they took to be the loom of a vessel. Admitting, however, that it is a singular circumstance that these two men did not notice the light if it was there, and giving full weight to the fact as evidence of its non-existence, still they may possibly have failed to notice it; and, at any rate, the great weight of the testimony is that it was set and brightly burning at and before the collision. There is evidence that it was so set in a crane

aft that it did not show forward within about a quarter of a point of the bark's course. This, however, is immaterial, as both parties admit that the schooner was at least two points on her port bow. It follows from the finding of this fact that the schooner ought to have made the light of the bark certainly as soon as the bark made the schooner's light. The bark's light was much higher above the water, and, the bark being to leeward, it was especially incumbent on the schooner to keep a good lookout in that direction, since, if a vessel appeared there, the schooner, being to windward, was bound under the rule to keep out of her way. The schooner is therefore chargeable with fault in not keeping a good lookout, and in not seeing the bark's light.

I think the testimony shows that the bark kept her course till the collision. This she had a right and was bound to do. She is charged with fault in not luffing. She was not bound to luff. The master and mate of the schooner thought she was keeping off. In this I think they were mistaken. Where a vessel is indistinctly seen from another vessel it is easy to mistake her course, and as she comes more plainly in view and her course is more distinctly made out there is frequently an appearance of a change of course which is not real. The testimony from the bark does not sustain the point that she changed her course to starboard, nor, indeed, is such a change alleged as a fault in the libel. The captain of the schooner testified that if the bark had luffed when he first saw her he thought a collision would have been avoided. He does not testify that if she had kept on her course the collision would have been avoided. He thought there was a possibility that she might have crossed her bow if she had kept her course, and not kept off. Upon the whole case the cause of the collision was the negligence of those in charge of the schooner in not keeping a good lookout, and in not seeing the light of the bark; and, being to windward of her when there arose a risk of collision, in not keeping out of her way, as required by the seventeenth rule of navigation.

Libel dismissed, with costs.

## THE MARY C. CONERY.

(District Court, D. New Jersey. 1881.)

## 1. DISRATING COOK—RESCISSION OF CONTRACT.

By disrating the cook and steward, and placing him before the mast, the master rescinds his contract; and, if the rescission is accepted by the steward, he is entitled to his discharge.

*Libel in rem.*

*Beebe, Wilcox & Hobbs*, for libellant.

*Goodrich, Deady & Platt*, for claimant.

NIXON, D. J. This case turns upon the legal effect of disrating a cook and steward, and putting him before the mast as a common seaman.

The libel alleges and the answer admits—

That the libellant shipped on board the brig *Mary C. Conery*, at the port of Fernandina, as cook and steward, on the first day of June, 1880, at the rate of wages of \$30 per month, for a voyage, not exceeding 10 months, to Rio de Grande de Natal; thence to the West Indies, and to a port in the United States, where the voyage was to terminate; that he entered upon his duties and the vessel proceeded to Natal, where she arrived on or about the sixth day of August, and remained there until and after the thirtieth day of August, 1880.

The libel further alleges—

That while lying at the port of Natal the libellant was discharged on the thirtieth of August without any cause or provocation, and was left in a foreign port; that there was due to him at the time of the discharge the sum of \$74 for wages; that he was also entitled, under the statute, to three months' extra pay, to-wit, \$90; and that he has suffered damage, on account of loss of time and expenses in returning to the United States, in the sum of about \$50.

The claimants, in their answer, set up as a defence—

That the libellant shipped as cook and steward, and represented that he was able and competent to perform the duties thereof; that he was not able to properly perform said duties, but was unskilful and incompetent, as cook and steward; that he repeatedly refused to obey the lawful orders of the master, and was so insulting and mutinous that on the said thirtieth day of August the master was compelled to and did disrate him, and ordered him into the forecabin to perform duty as an ordinary seaman; that upon being sent forward the libellant refused to do duty or to obey the commands of the master, and on the same day, without the permission of any of the officers, left and deserted the vessel at Natal, and never afterwards returned.

By the general maritime law, as well as by statute, (Rev. St. § 4596,) desertion is followed by the forfeiture of all wages earned. But a

seaman's leaving the vessel without permission is not necessarily desertion. In order to constitute desertion, in the sense of the law, he must quit the ship and her service, not only without leave, but without justifiable cause, and with intent not again to return to the ship's duty. It is admitted that the libellant went without leave, but the question remains, had he justifiable cause for going? A master, doubtless, may disrate a cook and steward, if it turns out that he is incompetent to perform properly the duties of the position, and when this occurs at sea he may assign the disrated person to the performance of such services as are reasonable under the circumstances, until they reach a port. But I regard such an act by the master as an abrogation of the contract with the cook and steward, and leaves him, when a port is reached, or if the disrating takes place in port, to the option of accepting it as a discharge, or of remaining on board in his new position. If he elects the former, he is entitled to the payment of wages, according to the contract, up to the date of the disrating.

I do not find this question discussed in the books, nor did the proctors on the argument refer me to any authority touching it. But since I have reached the above conclusion on principle, I have been strengthened in its soundness by observing the case of *The Hotspur*, 3 Sawy. 194, in which Judge Deady takes the same view, and holds that the disrating of the cook and steward, and placing him before the mast, amounts in law to the rescission of the contract by the master, and the steward, accepting such rescission, may claim his discharge.

"Admitting," says the learned judge, "that the libellant was properly disrated, I think he is entitled to his discharge. By disrating him the master abrogated the contract to serve as cook and steward, as far as he is concerned. This contract being thus terminated, the master ought not to be allowed to hold the libellant to other service against his will. \* \* \* Where the person disrated is unwilling to remain longer on board, I do not think the master has any power to compel him to remain and serve in a capacity totally different from that in which he engaged."

As the proctor for libellant, at the hearing, waived all claims for extra compensation, or for the expenses of getting back to the United States, the above view renders it unnecessary for me to consider whether the libellant was properly disrated or not. The testimony largely turned upon that question, and to justify the course of the master, a book, purporting to be his official log-book, was brought forward, which bears upon its face and internally so much proof that it was manufactured for the occasion that I ought not to let it pass without

observation. The book produced was an old printed official log of the brig, which seems to have closed in June, 1877. To the end of this three sheets of foolscap paper had been stitched, and the master had headed them with the title, "Official log of brig Mary C. Conery from Fernandina towards Natal." The first entry and date in the record is June 1, 1880, when they sailed from Fernandina, and the latest is August 30, 1880, at Natal, when the libellant left the vessel; although there are a number of entries subsequent to this, purporting to record transactions of an earlier date. The writing has the appearance upon its face of being a record made up at one time, and not at the different dates assigned, and the nature and contents of the entries themselves strikingly confirm the impression. For instance, the libellant shipped on board on the first day of June, 1880. The following is the entry of the fact:

"1880. June 1. Louis Kriete shipped as cook and steward. He recommended himself as being a first-class cook and steward. Demanded first-class wages—\$30 per month. He has proved to be entirely incompetent; almost worthless; wasteful, careless, dirty, and disobedient. Will not obey my orders. Cannot make bread, nor do any kind of cooking, except boil beef and pork. Neither does he know how much or how little to cook, thereby causing a great waste of stores."

To make the log of any value as evidence in cases of this sort, the entries should be made at the time of the transactions referred to. They should, at least, have the appearance of being the result of the master's observation and knowledge at the time of the entry. Is it not quite remarkable that on the day and hour of the libellant's entrance upon the vessel the master should have learned all these facts in regard to his incompetency? But the second entry exhibits a still more wonderful prescience on the part of the master. It was made under the date of June 7th,—*six* days after the cook went on board,—and it had reference to his dilatory or lazy habits. The statement is that "it was *seven* days before he (the cook) could spare 20 minutes' time to scrub the cabin floor." But I will not pursue the subject further. I have adverted to it that the claimants may learn that I have not overlooked it, and that no court should have confidence in official logs thus made up.

As there seemed to be no dispute that the libellant was entitled, if to anything, to the sum of \$74 for wages earned, a decree may be entered for that sum, unless the parties should desire a reference.

## THANNHAUSER v. THE CORTES Co. (Three Cases.)

*(Circuit Court, S. D. New York. July 30, 1881.)*

## 1. PRACTICE—CIRCUIT COURT—SECURITY FOR COSTS.

Security for costs, other than required by the rules, will not be required of a plaintiff in this court where the motion is made before answer, and the moving papers neither show any item of taxable costs or disbursements yet incurred, nor any steps taken which involved any disbursements, nor any itemized statement of extraordinary disbursements which are to be made at once in proceedings already taken.

*Bettens & Lilienthal*, for plaintiffs.

*L. E. Chittenden*, for defendants.

BROWN, D. J. The plaintiffs, who are now residents of this state, have brought these suits to recover their alleged claims growing out of a sale of mining property to the defendants. No security for costs having been filed, the defendants, before answer, now move upon affidavits for an order requiring the plaintiffs to file security for costs in the sum of \$1,500 to \$2,000 in each case. The defendants' affidavits tend to show that the transaction was fraudulent on the plaintiffs' part, but they do not show any item of taxable costs or disbursements yet incurred by them in either case, nor any steps yet taken which involved any disbursements whatever. The averments in this regard are entirely general, and in substance state only that large disbursements will be incurred in taking necessary testimony in Mexico, where the fees of commissioners, interpreters, and witnesses are alleged to be heavy. This is too general and too indefinite to warrant or to enable the court to fix any sum to be given as extraordinary security; nor do I think any order of that character should be made until after answer put in and the determination thereby of the precise issues to be tried, nor except upon a statement in detail of the items of extraordinary disbursements which either have been already incurred, or are immediately and necessarily impending, in proceedings already taken in the causes.

I have examined the papers in the *Emma Mine Cases*, and the orders made thereon by *Johnson, J.*, in 1875, referred to by the defendant's counsel, and find that where he granted an order for \$2,000 in one of these cases the moving affidavits specified in detail large disbursements already incurred sufficient to call for the order made, while in another of the cases specifying such details, but not in excess of the bond already filed, he refused to order further

security. If, as defendants allege, the plaintiffs are insolvent, (though that is denied by them,) the court ought to be only the more cautious not to interpose any impediments in the way of their prosecuting any legal claim they may have except upon clear evidence of its necessity to protect the defendants' rights, and then to no greater extent than manifest necessity requires. The practice in the state courts, where the right to large costs and extra allowances by way of costs may arise prospectively from the commencement of the action, cannot apply to actions in this court, where such costs and allowances are unknown, and where large actual disbursements are the only ground of requiring extraordinary security.

The plaintiffs must give the ordinary security required by the rules, without prejudice to the right of the defendants hereafter to apply for further security upon proof of disbursements necessarily incurred in excess of the security filed.

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THE CORTES CO. *v.* THANNHAUSER and another.

CHITTENDEN and others *v.* THE SAME.

(*Circuit Court, S. D. New York. November 2, 1881.*)

1. PROCESS—ACT OF 1875, § 1—EQUITY RULE 13.

A subpoena or notice, issued on the filing of a bill in equity to enjoin an action at law, is not regarded as an original process or proceeding within the meaning of section 1 of the act of March 3, 1875, nor as within the terms of rule 13 in equity.

2. SAME—SERVICE OF.

A bill brought by a defendant to enjoin the suit at law is only ancillary to such suit; but the court may, in its discretion, order personal service of the subpoena on the plaintiff, if he can be found, in addition to substituted service on his attorney.

*L. E. Chittenden*, for plaintiffs.

*S. B. Clarke* and *J. W. Lilienthal*, for defendants.

BLATCHFORD, C. J. The defendants in these suits have brought two suits at law in this court against the Cortes Company and one suit at law in this court against Lucius E. Chittenden and others to recover sums of money alleged to be due. The above are suits in equity. The first of them is brought to restrain the prosecution of all three of the suits at law, and the second to restrain the prosecution of the suit at law against Chittenden and others. Properly interpreted, there is no prayer in either of the two bills for any relief except injunctions to stay the prosecution of the suits at law. The



ground stated for such relief is that there is, on the facts alleged in the bills, and which are alleged in the same terms in both bills, an equitable defence to all of the suits at law, which, if established as alleged, would warrant a perpetual stay of the suits, but that such defence cannot be availed of in the suits at law, by reason of the distinction maintained in the jurisprudence of the United States between proceedings at law and proceedings in equity, as shown by the ruling in *Montejo v. Owen*, 14 Blatchf. 324, and in the cases there cited.

The plaintiffs, on filing the bills, and on notice to the attorney for the plaintiffs in the suits at law, now move for an order that service of the subpoena to appear and answer in these suits, or such other notices as the court shall adjudge proper, with a view to enable the court to proceed with these suits, upon said attorneys, be deemed sufficient and proper service upon the said plaintiffs as defendants in these suits, they being either foreigners or citizens of California and residents of San Francisco, in California.

It is a well-settled principle that a bill filed on the equity side of a court, to restrain or regulate a judgment or a suit at law in the same court, is not an original suit, but ancillary and dependent, and supplementary merely to the original suit; and that such a bill can be maintained in a federal court without reference to the citizenship or the residence of the parties. *Logan v. Patrick*, 5 Cranch, 288; *Dunn v. Clarke*, 8 Pet. 1; *Clarke v. Mathewson*, 12 Pet. 164; *Freeman v. Howe*, 24 How. 450, 460. On this principle the equity suit, not being an original suit, the process or notice issued on its being brought, to advise the plaintiff in the suit at law that it has been brought, is not regarded as original process or as an original proceeding. Such plaintiff is in court, voluntarily, for the purpose of prosecuting his suit at law and obtaining a judgment, and thereby makes himself subject to any control the court may find it equitable to exercise over his suit at law and over the matters involved in it, to the extent of perpetually staying its prosecution, if, on equitable considerations, that ought to be done. All that is requisite is that the plaintiff in the suit at law should have notice from the court of the institution of the proceeding in equity. If he will not defend against it, after receiving such notice, he will have to submit to the stay of his suit at law, if, after an *ex parte* hearing, the court shall deem such stay proper. He is in court, for the purposes of the action of the court on the subject-matter of the proceeding in equity, by having become the plaintiff in the suit at law. He is represented, for the purpose of giving notice to him of the institution of such proceedings, by his

chosen attorney in the suit at law. This is a necessity. His residence may be unknown, or, if known, remote. His attorney is presumed to know how and where to communicate with him. Therefore it is proper to give such notice to the attorney, and it is the duty of the attorney to bring such notice to the attention of his client. If he does not, or until he does, it is proper that the client should submit to any stay the court may direct of further proceedings in the suit at law; reasonable time being given for the communication of such notice to the client that he may discontinue the suit at law or defend the suit in equity, or put the matter into the hands of other counsel, or have a fair opportunity to take such other course as shall be deemed advisable. It may be proper to cause an additional and direct notice to be served on the plaintiff in the suit at law personally, if that is feasible.

It is provided by section 1 of the act of March 3, 1875, (18 St. at Large, 470,) that no civil suit shall be brought before a circuit court or a district court "against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding," except as provided in section 8 of the same act, which provides for bringing in absent defendants in suits to enforce or remove liens on property within the district. Substantially the same provision as to "original process" was contained in section 11 of the act of September 24, 1879, (1 St. at Large, 79,) and was re-enacted in section 739 of the Revised Statutes. A subpoena or notice issued on the filing of such a bill as those in the present suits has never been regarded, in the courts of the United States, as an original process or proceeding, and has been allowed to be served on the attorney for the plaintiff in the suit at law, and even to be served on such plaintiff out of the district. *Logan v. Patrick*, 5 Cranch, 288; *Read v. Consequa*, 4 Wash. 174; *Ward v. Seabry*, Id. 426; *Dunlap v. Stetson*, 4 Mason, 349, 360; *Dunn v. Clarke*, 8 Pet. 1, 3; *Bates v. Delavan*, 5 Paige, 299; *Doe v. Johnston*, 2 McL. 323, 325; *Sawyer v. Gill*, 3 Woodb. & M. 97; *Segee v. Thomas*, 3 Blatchf. 11, 15; *Kamm v. Stark*, 1 Sawy. 547, 550; *Lowenstein v. Glidewell*, 5 Dill. 325.

It is further objected that the supreme court, by rule 13 in equity, has provided that "the service of all subpoenas shall be by a delivery of a copy thereof, by the officer serving the same, to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who

is a member or resident in the family." The practical construction of this rule has always been not to extend it to subpoenas on bills such as those in the present cases. The practice before referred to has existed while rule 13 has been in force, and has never been understood to be affected by that rule.

An order for substituted service on the attorneys will be made, and, in addition, it will be ordered that a copy of the subpoena be served on the parties personally, if they can be found, wherever they may be.

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HOLMES, Adm'r, etc., v. OREGON & CALIFORNIA R. Co.

(Circuit Court, D. Oregon. October 20, 1881.)

1. JUDGMENTS—COLLATERAL ATTACK.

The general rule, in the language of the court, is that a question of fact once determined and adjudged, by a court having authority to make the inquiry and adjudication, is conclusively determined, unless the judgment is set aside on appeal to some higher court, or upon some direct proceeding within the recognized rules of law to annul it. Hence, where the statute of the state provided that the administration of the estate of an intestate shall be granted by the county court when the intestate, "at or immediately before his death, was an inhabitant of the county," etc., the decision of the court on the question of inhabitancy, properly presented for its adjudication, is not open to examination in a subsequent proceeding in a federal court.

*Sidney Dell*, for libellant.

*Dolph, Bronaugh, Dolph, and Simon*, for defendants.

SAWYER, C. J. On petition for rehearing. This is an appeal from a decree of the district court, in a suit to recover the sum of \$4,900, under section 367 of the Oregon Civil Code, on account of the death of William A. Perkins, which occurred on November 16, 1878, and which is alleged to have been caused by the negligence of the defendant while transporting said Perkins across the Wallamet river, at Portland, on its steam-ferry.

On the day named the deceased, then in his twenty-second year, in company with his mother, Mary A. Riggs, left Salem, Oregon, for Portland, in the same state, intending to take the steamer at the latter place for California. In crossing the Wallamet river, on defendant's ferry, while landing at Portland, in Multnomah county, he fell overboard and was drowned. Soon after, said Mary A. Riggs, mother of the deceased, who was the next of kin and one of his heirs at law, and entitled to letters of administration under the laws of Oregon, (Or. Code, § 1053,) filed a verified petition in the county court of Multnomah county, in which she styled herself Mary A. Riggs, of the city of Portland, and alleged that William A. Perkins died on November 16, 1878, in said Multnomah county and state of Oregon; "that deceased was, at or im-

mediately before his death, an inhabitant of said county;" that he left as assets the claim now sued upon, and no other property; that he left no creditors and no will; that she herself, the mother of said deceased, "residing in said city of Portland," two minor half-sisters, who "reside with your petitioner in said city," and a minor brother, residing in Cambridge, Vermont, were the only next of kin and heirs at law of the said intestate. The petition alleges all other jurisdictional and necessary facts and in said petition petitioner expressly renounced her right to administer upon the estate of deceased, and prayed the court to grant letters of administration to H. W. Davis, whom she alleged to be a fit and competent person to administer upon said estate. Acting upon said petition, the county court of Multnomah county, at a regular term of said court, on December 16, 1878, in an order made and entered in the records, in which it was recited that it was "proved by the oath of the petitioner, Riggs, that the said William A. Perkins died on or about the sixteenth day of November, 1878, intestate, in the county of Multnomah and state of Oregon, being, at or immediately before his death, an inhabitant of said county," etc., ordered that letters of administration on the estate of said intestate be issued to H. W. Davis; and letters were accordingly issued, and said Davis qualified and entered upon his duties as such administrator—the proceedings being all in due form and regular upon their face. The said order and appointment are still unrevoked and in full force. Afterwards, on January 2, 1879, said Davis, as such administrator, brought an action at law against the defendant in the circuit court of Oregon, under section 637 of the Code of Oregon, for the identical cause of action alleged in the libel herein, in which issue was joined, and in which there was a trial by jury and a verdict in favor of the defendant, upon which verdict a final judgment was regularly entered on March 31, 1879. Said judgment was afterwards duly affirmed, on appeal, by the supreme court of Oregon, on August 11, 1879; and it still remains in full force and effect. Afterwards, Sidney Dell, who had been the attorney of Mrs. Riggs and said administrator, Davis, in the said prior proceedings, filed a petition, as petitioner, in the county court of Jackson county, Oregon, in which it is alleged "that deceased was, at and immediately before his death, an inhabitant of said county of Jackson, in said state of Oregon;" that the same parties mentioned in the said prior petition were next of kin and heirs at law, etc.; that the said cause of action was the only estate of deceased; that there were no creditors; that more than 40 days had elapsed since the death of the intestate, and neither the widow, next of kin, nor any creditor had "made application within that time to *this court* for letters of administration," and praying that Leander Holmes be appointed administrator, whereupon said Holmes was appointed such administrator on September 17, 1879. Holmes, having qualified and received his letters, filed the libel in this suit for the identical cause of action brought by Davis, administrator, in the state court. In addition to the issue taken on the case made by the libel, the defendant sets up as defences—*First*, that libellant was never administrator; *second*, the prior adjudication in the state courts. At the hearing at the last term, although the court intimated that its impressions were against the libellant upon other points, the case was in fact decided upon the first point named—that the libellant was never administrator. This point has

been thoroughly and ably argued and reargued, and I have given it that careful consideration which the importance of the case, and of the principle involved, deserve.

Whether the libellant is administrator depends upon the question whether the appointment of Davis, who was appointed by the county court of Multnomah county, and whose appointment, if legal, was still in force, was valid; and if not, then whether the intestate was in fact an inhabitant of Jackson county "at or immediately before his death." As to the first point, the appointment of an administrator of an estate, while there is already a legal administrator, is void. The title to all the estate having already vested in the existing administrator for the purposes of administration, there is no estate in existence which can vest in the second appointee by virtue of his appointment. There is no subject-matter upon which he can act. *Griffith v. Frazier*, 8 Cranch, 9; *Kane v. Paul*, 14 Pet. 33; *Haynes v. Meeks*, 20 Cal. 288; *Hamilton's Estate*, 34 Cal. 464.

Was Davis, then, administrator at the time of libellant's appointment? The only ground of invalidity in the appointment of Davis, alleged and relied on by libellant, is that Perkins, "at or immediately before his death," was not in fact an inhabitant of Multnomah county, and the county court of that county had no jurisdiction to make the appointment, and it is insisted that the appointment, for that reason, is absolutely void.

The first point to be considered, then, is, is the question of inhabitancy open to examination on a collateral attack? Section 1, art. 7, of the constitution of Oregon, so far as it relates to county courts, is in the following language: "The judicial power of the court shall be vested in a supreme court, circuit court, and *county courts, which shall be courts of record*, having *general* jurisdiction, to be defined, limited, and regulated by law in accordance with this constitution." Gen. Laws Or. p. 87. Thus the people of Oregon, in their fundamental law, have relieved the county courts of the badge of inferiority, in the technical sense of that term, and made them courts of record,—superior courts,—and so far as the sanctity of their determinations, and the faith and credit due to their records are concerned, placed them upon a plane of equal dignity with the circuit and supreme courts. The general jurisdiction is conferred, and the character of the court fixed in the same section and in the same language as that which fixes the *status* of the other courts. The same effect must, therefore, be given to their determinations upon collateral attack, and the same inviolability attributed to their records as to the records of the circuit

courts, or of the supreme court itself. This point is also settled by the decision of the supreme court of Oregon. *Tustin v. Gaunt*, 4 Or. 306. The character and dignity of the county court having been thus defined and established, section 12, of the same article of the constitution, provides that "the county court shall have the jurisdiction pertaining to probate courts," etc., thus conferring, in general terms, upon the county court general jurisdiction over the subject-matter of the estates of deceased persons. In regulating the exercise of this general jurisdiction thus conferred, in pursuance of the provisions of section 1, art. 7, of the constitution before cited, the statute provides that the administration of the estate of an intestate shall be granted by the county court when the intestate, "at or immediately before his death, was an inhabitant of the county, in whatever place he may have died." Or. Civ. Code, §§ 1051, 1052. Section 1060 provides, "in an application \* \* \* for the appointment of an administrator, the petition shall set forth the facts necessary to give the court jurisdiction." In this case, as has been seen, the facts were all properly set forth, and it was distinctly alleged in the petition that the intestate was, "at or immediately before his death, an inhabitant of Multnomah county." This averment presented the issue as to inhabitancy to be determined, and the court did in fact determine and adjudge it upon evidence under oath, and its judgment on its face contains the recital: "It being proved by the oath of the petitioner, Riggs, that the said William A. Perkins died on or about the sixteenth day of November, 1878, intestate, in the county of Multnomah and state of Oregon, *being at or immediately before his death an inhabitant of said county.*" Can this determination be re-examined in a collateral proceeding, and if found erroneous treated as a nullity, on the ground that the court was without jurisdiction? To resolve this question it must be determined what jurisdiction is. The supreme court of the United States has repeatedly defined jurisdiction. In *Grignon's Lessees v. Astor*, 2 How. 338, the supreme court, quoting from a prior case, says:

"The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action. If the petitioner presents such a case in his petition that, on a demurrer, the court would render a judgment in his favor, it is an undoubted case of jurisdiction. Whether, on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction, conferred by the filing of a petition containing all the requisites, and in the manner required by law. 6 Pet. 709. Any movement by a court is necessarily the exercise of jurisdiction; so, to exercise any judicial power over the subject-

matter and the parties, the question is whether, on the case before a court, their action is judicial or extrajudicial, with or without authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it. 12 Pet. 718; 3 Pet. 205. It is a case of judicial cognizance, and the proceeding is judicial. 12 Pet. 623."

The court further says:

"No other requisites to the jurisdiction of the county court are prescribed than the death of Grignon, the insufficiency of his personal estate to pay his debts, and a representation thereof to the county court where he dwelt, or his real estate was situate, making these facts to appear to the court. Their decision was the exercise of jurisdiction, which was conferred by the representation; for whenever that was before the court, they must hear and determine whether it was true or not. It was a subject upon which there might be judicial action. The record of the county court shows that there was a petition representing some facts by the administrator, who prayed an order of sale; that the court took these facts which were alleged in the petition into consideration and for these and divers other good reasons ordered that he be empowered to sell." Id. 339.

And again, (page 340:)

"The petition in the present case called for a decision of the court that the facts represented did or did not appear to them to be sufficiently proved. They decided that they did so appear, whereby their power was exercised by the authority of the law, and it became their duty to order the sale," etc. \* \* \*

"The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken; the rule is the same whether the law gives an appeal or not,—if none is given from the final decree it is conclusive upon all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree, it can be impeached only by fraud in the party who obtains it."

And again, quoting Chief Justice Marshall in *Ex parte Watkins*, 3 Pet. 204, 205:

"A judgment in its nature concludes the subject in which it is rendered, and pronounces the law of the case. The judgment of a court of record, whose jurisdiction is final, is as conclusive on all the world as a judgment of this court would be. It is as conclusive in this court as it is in other courts. *It puts an end to all inquiry into the fact by deciding it.*"

This definition of jurisdiction, and these views, have been reiterated and affirmed over and over again by the supreme court, and I am not aware that they have ever been modified or questioned. See *Ex parte Watkins*, 3 Pet. 205; *U. S. v. Arredondo*, 6 Pet. 709; *In re Bogart*, 2 Sawy. 401. The doctrine and the case of *Grignon's Lessees*

is affirmed in *Florentine v. Barton*, 2 Wall. 216, in which the court says:

"The petition of the administrator, setting forth that the personal property of the deceased is insufficient to pay such debts, and praying the court for an order of sale, brought the case fully within the jurisdiction of the court. It became a case of judicial cognizance, and the proceedings are judicial. The court has power over the subject-matter and the parties."

How did the court get jurisdiction? Not merely by the actual existence of the jurisdictional facts, but by their averment in the petition, and—

"The court having (by such representation) the right to decide every question which occurs in a cause, whether the decision is correct or otherwise, its judgment, until reversed, is binding on every other court. Id. \* \* \* This proposition will be found fully discussed at length, and fully decided by us, in *Grignon's Lessees v. Astor*. Any further argument in vindication of them would be superfluous." Id.

Affirmed again in *Comstock v. Crawford*, 3 Wall. 403, 406. See, also, *Caujolle v. Ferrie*, 13 Wall. 465; *McNitt v. Turner*, 16 Wall. 363, 366. In the very late case of *Mohr v. Manierre*, 101 U. S. 424-5, the supreme court, by Mr. Justice Field, citing *Grignon's Lessees*, says:

"This court, however, held that no other requisites to the jurisdiction of the county court were prescribed by the statute than the death of the intestate, the insufficiency of his personal estate to pay his debts, and a representation of the facts to the county court where he dwelt or his real estate was situated; that the decision of the county court upon the facts was the exercise of jurisdiction which the representation conferred; and that the decision could not be collaterally attacked by reason of them. The court observed in substance \* \* \* that it was sufficient to call its powers into exercise; that the petition stated the fact upon the existence of which the law authorized this sale; that the granting of the license was an adjudication that such facts existed," etc.

And again:

"The statute declared that upon the existence of certain facts the sale of the lunatic's estate might be made, and when these appeared in the petition of the guardian, the court had jurisdiction to act, so far as his rights were concerned, as fully as if the statute has so declared in terms, whatever may be the effect of its proceedings upon the interests of parties not properly brought before the court." Id. 426.

Thus, in that case, the principle so often repeated is again recognized and asserted, that when the jurisdictional facts are alleged in the petition, the court has jurisdiction to act upon them; that the determination of the truth or falsity of those facts is judicial action,



in the exercise of jurisdiction, and is conclusive when brought collaterally before another court.

Try the case under consideration by the tests thus repeatedly laid down, and reasserted and reaffirmed over and over again by the supreme court for a period of more than 50 years. Did not the "petitioner present such a case in her petition that on demurrer the court would render judgment in her favor?" There can be but one answer to this question. Then, says the supreme court "it was an undoubted case of jurisdiction." Was the court required to act upon the petition? Then, "any movement of the court" in acting upon it was "the exercise of jurisdiction." The law, as we have seen, required a petition stating the jurisdictional facts to be presented to the court, and required the court to act upon it. The proper representation of the fact of inhabitancy in the petition is strictly jurisdictional; the actual existence of the fact, jurisdictional only *sub modo*. The determination of the truth of the representation depends upon evidence and the exercise of jurisdiction. See *Haggart v. Morgan*, 5 N. Y. 429. The petition filed in this case represented all the jurisdictional facts.

"The decision upon it," says the supreme court, was the exercise of jurisdiction which was conferred by the representation;" for "when-ever that was before the court they must determine whether it was true or not." "It was a subject upon which there might be judicial action." The determination and granting letters—

"Is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial if no appeal is taken. The rule is the same, whether the law gives an appeal or not. If none is given from the final decree it is conclusive on all whom it may concern. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree, it can be impeached only by fraud in the party who obtained it." 2 How. 340.

The court certainly had power, because it was required to do so, to act upon the petition of Mrs. Riggs, and determine the truth of the matters alleged, and to make a decree to give effect to that determination. Otherwise, to what end is it to consider the petition at all? And in the language of Chief Justice Marshall, "the judgment in its nature concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record, whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. \* \* \* It puts an end to all inquiry into the fact by deciding it." Those are the conditions found in this case,

and such must be the result unless the law, as it has been recognized and enforced in the supreme court of the United States for more than half a century, is to be abrogated. The court certainly was authorized to adjudge and decree whether, upon the petition and proofs, Perkins was or was not an inhabitant of Multnomah county at or immediately preceding his death. It was required by the statute to determine that question. No court in the state could act at all in such a case without making this inquiry. No court could know how the actual fact was by intuition, or take judicial notice of it. There must be proper allegations and proof, which the court must consider; and the inquiry must, in the nature of things, rest on antecedent authority. That authority is jurisdiction, and the inquiry judicial action within the jurisdiction. The correct determination of the fact depends upon the truthfulness of the evidence and correct deductions from it; and in both particulars there is liability to error. It seldom happens that disputed facts can be determined with absolute certainty. The evidence upon different trials of the same issues of fact may be entirely different, and not only justify but absolutely require different determinations and different adjudications. Different minds may make different deductions from the same evidence, where there is room for doubt. But the peace and interests of society require that there should be an end to litigation. Hence the rule, as important to the well-being of society as any known to the law, that a question of fact once determined and adjudged by a court having authority to make the inquiry and adjudication, is conclusively determined unless the judgment is set aside on appeal to some higher court, or upon some direct proceeding within the recognized rules of law to annul it. In this case, in my judgment, the county court of Multnomah county had jurisdiction upon the petition filed and evidence, to inquire into, determine, and adjudge the fact of inhabitancy of Perkins at or immediately before his death; and having made the inquiry, and determined and adjudged the fact, the judgment is "conclusive on all the world," and "puts an end to the inquiry concerning the fact by deciding it." The petition for the appointment of an administrator, and the proceedings thereon, are in the nature of proceedings *in rem*. "All the world was a party" to the proceedings, and consequently all the world is estopped by the adjudication thereon. *Grignon's Lessees*, 2 How. 338.

The broad principle urged by libellant's counsel, that the question of Perkins' inhabitancy is strictly jurisdictional, and that all jurisdictional facts, notwithstanding they have been heard and determined

on proper allegations and evidence in the courts called upon to act in the matter, are still open to inquiry collaterally in the same or other courts, would render the adjudications of nearly all private cases in the national courts inconclusive and open to collateral attack. The national courts, while technically courts of record and superior courts, are yet courts of limited jurisdiction. This has been often so determined by the supreme court, and it is only necessary to read the constitution and statutes conferring jurisdiction to perceive it. In private cases the jurisdiction usually depends either upon the citizenship of the parties, or whether the case arises under the constitution and laws of the United States. In the former case the jurisdictional fact of citizenship must be alleged, and, if denied, proved. In the latter case there is often a difference of opinion as to whether the case arises under the constitution or laws of the United States. Are the questions of citizenship, and whether the case is one arising under the constitution and laws of the United States,—the jurisdictional facts,—when once adjudicated upon proper allegations and proofs, to be ever after open to examination and repeated re-examinations, at the pleasure of the parties, whenever they are brought collaterally before the same or other courts? They certainly are, if the libellant's proposition can be maintained, for they are jurisdictional facts in the same sense and precisely of the same kind of jurisdictional facts as the inhabitancy of Perkins. Citizenship, as a jurisdictional fact, is precisely similar to inhabitancy. They are established when controverted by similar evidence, and one is as easily proved as the other. To give the national courts jurisdiction, on the ground of citizenship, the opposing parties must be either citizens of different states, or one must be a citizen and the other an alien. Unless this condition exists the court has no jurisdiction, and the court in which the case is brought must necessarily determine for itself whether the jurisdictional fact exists or not. When this jurisdictional fact is alleged in the pleadings, established to the satisfaction of the court, and determined by it, its adjudication upon the fact is conclusive; and it has been so distinctly decided and settled by the supreme court of the United States in *Erwin v. Lowry*, 7 How. 180. I am not aware that the proposition has ever since been questioned. The supreme court has gone so far as to hold that in judgments of the circuit courts, being courts of record, this question cannot be collaterally raised upon a record which does not even aver the jurisdictional facts. *McCormick v. Sullivan*, 10 Wheat. 199; *Kenedy v. Bank of Georgia*, 8 How. 611, 612. See, also, *Skillern's Ex'r*,

*v. May's Ex'r*, 6 Cranch, 267; *Washington Bridge Co. v. Stewart*, 3 How. 424. It is also settled that the averment of citizenship can only be traversed by a plea in abatement to the jurisdiction. If not so controverted, it is deemed conclusively established. *Smith v. Kernochen*, 7 How. 216; *Jones v. League*, 18 How. 81; *De Sorby v. Nicholson*, 3 Wall. 423; *Evans v. Gee*, 11 Pet. 83; *Wickliffe v. Owings*, 17 How. 48; *P. W. & B. R. Co. v. Quigley*, 21 How. 214. Thus, unless a special plea to the jurisdiction putting in issue the allegation of the jurisdictional fact of citizenship is interposed, the jurisdictional fact is conclusively admitted on the record, whether it exists or not; and there can be no doubt that the adjudication upon that fact would be conclusive in all other courts in a collateral proceeding.

The place of the commission of all crimes is a jurisdictional fact which must be alleged in the indictment. The offence must be committed within the territorial jurisdiction of the court, or it cannot take cognizance of it. Section 22 of the Oregon Criminal Code (Gen. Laws, 343) provides that, with certain specified exceptions, "all criminal actions must be commenced and tried in the county where the crime was committed." The fact that the crime was committed within the county for which the court is held, is, then, a jurisdictional fact in the same sense as inhabitancy in the case of an intestate, except that the language in reference to crime as a jurisdictional fact is of a more mandatory character in form of expression. The indictment must allege this jurisdictional fact, and, if it is controverted, it must be proved. Will it be said, when this fact is alleged in an indictment, and proved to the satisfaction of the court and jury, that the adjudication thereon by the court is not conclusive, because it turns out that the offence was not in fact committed in the county, or at any other place within the territorial jurisdiction of the court? I apprehend not. Yet if there is error in the verdict on this point, the jurisdictional fact does not exist in the same sense that it is non-existent in the case of the inhabitancy of an intestate at or immediately before his death, when there has been an erroneous determination of the fact upon proper allegations and proof. In both cases the court was authorized and required, upon the pleadings and proofs, to inquire into and determine that fact. If the determination is conclusive in the one case it must be in the other. Suppose four or more counties corner together, as they well may, and a murder is committed at or near the common point in a state where the indictment must be found and tried in the county where the crime was committed, the evidence being conflicting as to the county in which the offence was

in fact committed, and the party charged is tried, found and adjudged guilty upon an indictment containing proper allegations of the jurisdictional facts, and hanged, are the judge and jury who tried the case, and the sheriff who executed the convicted prisoner,—I will not say murderers,—but guilty of taking the life of a citizen upon a proceeding absolutely void, and without the authority of law? Or, suppose the party charged is indicted and tried in the wrong county, and acquitted upon the sole ground that the homicide was committed in self-defence, can he be again indicted for the same offence in each of the four or more other counties, and acquitted on the same ground, until the last, which is in fact the proper county, and there convicted and hanged? Such might be the result if the jurisdictional fact is not conclusively determined in the first case, and the judgment therein is void for want of jurisdiction. On a second indictment in another county, the plea of former acquittal would not avail if the court had no jurisdiction to try the case. If the judgment is void for one purpose on that ground, it must be void for all. The party charged would not be twice in jeopardy, for he cannot be in legal jeopardy when the court has no jurisdiction to act in the case, and its action is a nullity. Void things are as no things. A conviction on an insufficient indictment is not a bar to a second indictment, because on an insufficient indictment the party is not in jeopardy. *U. S. v. Gibert*, 2 Sumn. 39; Whart. Crim. Pl. & Pr. (8th Ed.) § 507. So, also, there is no jeopardy when the jury is discharged without rendering a verdict for sufficient cause, as death or insanity of a juror, or where it is impossible for the jury to agree. *U. S. v. Perez*, 9 Wheat. 579; *U. S. v. Haskell*, 4 Wash. 410. In the *Vaux Case*, 2 Coke, Rep. 388, the court held—

“That the reason of *autrefois acquit* was because where the maxim of the common law is that the life of a man shall not be twice put in jeopardy for one and the same offence, [and that is the reason and cause why *autrefois* acquitted or convicted of the same offence is a good plea,] yet it is intended of a lawful acquittal or conviction, for if the conviction or acquittal is not lawful his life was never in jeopardy. 2 Sumn. 41. If it is not lawful to convict a man on an insufficient indictment, and for that reason the party so convicted is not in jeopardy, it is certainly not lawful to convict him by a court that has no jurisdiction to try the case, and whose judgment can be set aside as collaterally void; and a conviction by such a court cannot put the person in jeopardy. The close of the term of the court, under the statute, pending a trial, also justifies a discharge of a jury, and the party is not in jeopardy, because a continuance of the trial after the close of the term would be unlawful. The court has no authority to proceed. Its judgment would be unlawful, and the party not put in jeopardy. Whart. Crim. Pl. & Pr. § 513. A for-

*tiori* a judgment of a court without jurisdiction would be void, and there would be no jeopardy. Repeated indictments and trials in different counties, under the circumstances I have suggested, would be absolutely monstrous; yet evidence may be had at one time that cannot be got at another. The proofs may be entirely different on different trials, and the verdict on each trial justified by the evidence on that trial, though the verdicts on the several trials may be different. There can be but one safe and logical rule on this point applicable to the class of jurisdictional facts referred to, and that is, where the petition, complaint, bill, or indictment alleges the jurisdictional facts, and the court is authorized and required, upon the allegations and proofs, or admissions of the pleadings, to determine the truth of the allegations, it has power to give effect to its determination by its judgment or decree, and, having power to thus determine, adjudge, and decree, its adjudication is conclusive."

This very case presents a striking illustration of the necessity of the rule making similar determinations conclusive. On the death of Perkins, his mother, who was next of kin and one of his heirs at law, and the one to whom the law gave the first right to administer, filed her petition in the county court of Multnomah county, alleging that deceased was an inhabitant of Multnomah county at or immediately before his death, and the court, upon the petition and satisfactory evidence, so adjudged, and upon her request issued letters of administration to Davis. Davis immediately brought an action in the state court for the cause of action set up in the libel, and there was a jury trial, verdict, and judgment against him, which judgment was affirmed on appeal by the supreme court.

A stranger, then, acting upon the theory that the proceedings in Multnomah county are void for want of jurisdiction, on the ground that Perkins was not an inhabitant of that county at or immediately before his death, but a resident of Jackson county, filed a petition in the county court of the latter county alleging the jurisdictional facts, and thereupon the county court of that county issued letters of administration to libellant, who commenced this suit. The petition in the latter case does not allege that no letters of administration had been issued, but only that "no application has been filed in this court,"—the county court of Jackson county,—leaving it to be inferred that administration may have been had elsewhere. Upon the trial of this case in the court below, the district judge was of the opinion that Perkins, at or immediately before his death, was not in fact an inhabitant of either Multnomah or Jackson county, but of Marion county. I have read the evidence, and I am strongly inclined to think that deceased was not an inhabitant of Jackson county at or immediately before his death; but I do not decide that point, for the

reason that the case was submitted on the question of the conclusiveness of the proceedings in Multnomah county, and the question of inhabitancy was not argued, and it is not necessary to determine the fact on this petition for rehearing. I merely refer to the point for the purpose of illustration. If I should hold the proceedings in question inconclusive, and then, as I probably should, also find that Perkins was not an inhabitant of Jackson county at the time required, and decide the case against libellant on that ground, then some other stranger, moved by the parties in interest, might file a petition in the county court of Douglas county, where the defendant stopped a month after he left Jackson county, procure the appointment of another administrator, and go through with a third suit to the supreme court, and upon failure therein, on the same grounds, repeat the process in Marion county. Such repetitions of the litigation in the forums chosen by the parties in interest would, in my judgment, be to the last degree vexatious, and a law permitting it intolerable. The cases already cited from the supreme court, as I think, establish the principle that controls the decision of this case. But there are also numerous cases in the state courts to the same effect, and some of them determine the exact point. The precise point was presented and decided in favor of the conclusiveness of the judgment appointing an administrator by the supreme court of California in *Irwin v. Scriber*, 18 Cal. 500, and that case has been frequently affirmed in that state. *Rogers v. King*, 22 Cal. 72; *Warfield's Will*, 22 Cal. 51.

In *Lucas v. Todd*, 28 Cal. 185, 186, the court says: "The petition of the plaintiff for letters of administration *de bonis non* states all the jurisdictional facts and gave the court jurisdiction of the case."

The rule with reference to other jurisdictional facts is definitely stated by Chief Justice Field, now a justice of the supreme court of the United States, in *Haynes v. Meeks*, 20 Cal. 313. After stating that a proceeding to sell land by an administrator is a distinct and independent proceeding in the nature of an action, of which the filing of the petition is the commencement and the order of sale the judgment, citing *Sprigg's Case*, 20 Cal. 121, he proceeds:

"We must, then, examine the petition to ascertain whether a case is presented by its averments, within the statute, upon which the court can act. And the petition must show upon its face two things: *First*, the insufficiency of the personal property to pay the debts and charges against the estate; and, *second*, the necessity of the sale of the real property, or some portion thereof. Both must appear before the court can take jurisdiction of the proceeding. The truth of the averments—their sufficiency appearing—is

matter which must be determined at the hearing of the petition, and the judgment of the court thereon, if rendered upon legal notice, cannot be questioned collaterally. It may be reviewed, and, if erroneous, corrected on appeal, but not otherwise." 20 Cal. 313.

If these jurisdictional facts, once so determined on proper allegations and proofs, cannot be afterwards questioned collaterally, why should not a similar determination of the fact of inhabitancy, also, be conclusive? The same rule has, also, been established in many of the other states. See *Fisher v. Bassett*, 9 Leigh, 119; *Andrews v. Avory*, 4 Gratt. 229; *Abbott v. Coburn*, 28 Vt. 667; *Burdett v. Silsbee*, 15 Tex. 615; *Johnson v. Beazley*, 65 Mo. 264; *Bumsted v. Read*, 31 Barb. 664; *Bolton v. Brewster*, 32 Barb. 393. In Massachusetts a different view was taken in *Cutts v. Haskins*, 9 Mass. 547, but the character of the court does not appear, nor does it appear that there was any petition stating the jurisdictional facts. The court did pass upon the fact of residence, but it does not appear that the propriety of entering upon that inquiry was argued or decided, or even questioned. The editor of the Massachusetts Reports, in a note to the decision, calls attention to these points, and questions the decision on the ground that when the facts are averred in the petition, the determination should be conclusive. This case was afterwards followed in the same state in 5 Pick. 20, and 9 Pick. 259. But the great weight of authority, and, to my apprehension, the entire weight of reason, is the other way, and in favor of conclusiveness of the adjudication.

I should not have deemed it necessary to enter so fully into the discussion of the question, or to quote so largely from the authorities, had it not been for the case of *Thompson v. Whitman*, 18 Wall. 460, which libellant's counsel has cited, and pressed in the argument and petition for rehearing with unusual earnestness and zeal, as well as manifest confidence and sincerity, as being directly in point and controlling in this case. Did I suppose the supreme court intended in that decision to cover this case, I certainly should yield to its superior authority; but I cannot, after a full consideration of the case, satisfy myself that the supreme court designed the decision to be so far-reaching in its effects. It must be admitted that there is general language used in the opinion, which, considered by itself, lends some countenance to the view maintained by counsel. But if he is correct in the rule assumed to be established by that authority, then there is no jurisdictional fact that can be conclusively determined by any court under any circumstances, and in all the cases to



which I have referred the question of jurisdiction is open to examination and repeated re-examination, collaterally, as often as the record is presented, there could be no conclusive determination of any jurisdictional fact, and, certainly, none in any of the United States courts, depending upon citizenship of the parties, or upon the questions whether the case arises under the constitution and laws of the United States; and no conclusive determination of the jurisdictional facts alleged in an indictment for an offence, when the offence must be committed within the territorial jurisdiction of the court in which the indictment is found and tried. To give the decision the broad scope contended for, would be to overrule many cases deciding the principle upon which the conclusiveness of the adjudication rests in the same court, to which the court has not adverted in its decision. It cannot be supposed that it was the intention to overrule long-established principles without even mentioning the cases in which they were elaborately discussed and established. Besides, the doctrines of those cases, and the cases themselves by name, have been expressly reaffirmed since the decision in *Thompson v. Whitman*, and the case of *Grignon's Lessees* was cited and approved, and the principles established by it reaffirmed, as late as 101 U. S. 425-26. The case of *Thompson v. Whitman* did not call for a statement of principle so broad in its terms as some of the language used, and the language of a judicial opinion must be considered with reference to the case decided. There must be a line somewhere between disputable and conclusive adjudications of jurisdictional facts. Some, certainly, have been adjudged disputable, and others indisputable. The court says, in the case relied on: "It must be admitted that no decision has ever been made on the precise point" involved in that case. 18 Wall. 468. Then the court does not consider the "precise point" involved and decided in that case to be the same with any point decided in *Grignon's Lessees*, and therefore it cannot be the same as the point stated in this language:

"It is *coram judice* whenever a case is presented which brings this power into action. If the petitioner presents such a case in his petition that on a demurrer the court would render a judgment in his favor, it is an undoubted case of jurisdiction; whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out a case, is the exercise of jurisdiction conferred by the filing a petition containing all the requisites, and in the manner required by law."

That this and the further proposition, that the adjudication upon such a petition is conclusive, are points of the decision, was the

opinion of Mr. Justice Curtis, as is manifest from a consideration of the head-notes to the case in his edition of the supreme court reports; for he professed to limit his head-notes to the exact points considered and actually decided by the court. Nor did the court consider it precisely the same as that in *Comstock v. Crawford*, 3 Wall. 403; or as that in the very late case of *Mohr v. Manierre*, 101 U. S. 425. Nor the same point as that decided in *Erwin v. Lowry*, 7 How. 180, that the jurisdictional fact of citizenship determined in the national courts cannot be collaterally inquired into; that the determination of that jurisdictional fact is conclusive. The court, therefore, does not intend to touch these cases, nor the principles established by them.

Where, then, is the line of division? I apprehend it will be found by examining the case of *Thompson v. Whitman*, and the line of cases cited and commented on in that case, and comparing them with the other line of decisions cited in this decision, which were carefully avoided by the court in its opinion. It will be found, on such examination, that after a cause of action has arisen—after the cause of action is complete—something must always be done by the court, through its executive or ministerial officers, or somebody else on behalf of the court, to give the court jurisdiction, either of the person, or, in a proceeding *in rem*, of the thing; such as serving a summons in a cause at law, or subpoena in chancery, upon the person within the state, giving a notice in some prescribed place, mode, or form, or seizing the thing. To get jurisdiction of the person, he must not only be served with process, but he must be served within the territorial jurisdiction of the court, as within the same state. In such case service within the state is the jurisdictional fact to be performed by, and upon the authority of, the court, through its ministerial officers, or other agencies of the court appointed by law. In some states, as in New York, the service may be by private parties; but they act by the authority and on behalf of the court. In matters *in rem* there must be a *seizure*, and often some notice given to the parties in interest by the court in some prescribed mode. In such cases the seizure and notice are jurisdictional facts subsequent to, and wholly independent of, the cause of action, and of all pre-existing jurisdictional facts not depending upon the action of the court or its appointed agencies. In *Thompson v. Whitman* the offence was complete when the vessel engaged in gathering oysters within the waters of New Jersey contrary to the statutes of that state. But the cause of action and forfeiture being complete, it was necessary to seize the

vessel within the boundaries of the county over which the court had jurisdiction, to give jurisdiction to the court. The seizure within the county was the jurisdictional fact, and this was an act to be performed by the court, or, on its behalf, through the agencies appointed by law. The jurisdictional fact was an act to be performed to get jurisdiction of the thing, in all respects analogous to the service of summons within the state in order to acquire jurisdiction of the person, or the levy of an attachment upon the property in an attachment suit in order to get jurisdiction of the property. And this is the class of cases cited as authorities and commented on by the court in *Thompson v. Whitman*; and those acts to be performed by or on behalf of the court, in order to acquire jurisdiction of the person or thing, the class of jurisdictional facts that may be questioned collaterally under this authority and those cited, even though the court must have passed upon those facts. *Webster v. Reid*, 11 How. 456; *D'Arcy v. Ketchum*, 11 How. 172; *Harris v. Hardeman*, 14 How. 334; *Knowles v. Gas-light Co.* 19 Wall. 61; *Pennoyer v. Neff*, 95 U. S. 714; and *Thompson v. Whitman*, are fair examples of this class. So, also, where it is only necessary to compare the record with the law, to see that the record shows a want of jurisdiction on its face, the record is not conclusive. In such cases there is no re-examination of issues of fact determined in the case. Such a case is *Elliot v. Piersol*, cited by the court. Whenever the court undertakes to acquire jurisdiction over parties or things, through the acts of officers or other lawfully-appointed agencies, performed by its authority or on its behalf, it must see that the proper acts have been duly performed; and whether they have been performed or not, under the decision referred to, may be inquired into collaterally.

But there is another class of cases where there is a complete cause of action or proceeding existing, and the parties interested present all the facts—the necessary pre-existing jurisdictional facts, as well as the others constituting the cause of action—by alleging them in a petition, complaint, bill, or, in the case of the state, in an indictment or other proper pleading, and ask an adjudication upon them; and when the opposing party has had due notice by proper proceedings, to acquire jurisdiction of the person, the court is required to act upon the allegations and proofs, and determine the facts. The action of the court in determining the facts in such cases, the court having properly performed its part to get jurisdiction of the person or the thing, is the exercise of jurisdiction; and the determination and adjudication upon the allegations and proofs of the facts upon which the

court is so required to act, is conclusive upon a collateral attack, and I understand the authorities cited in this opinion to sustain that proposition, even though some of the pre-existing facts alleged are of a jurisdictional character. If the line thus indicated in these two classes of decisions is not the true one between disputable and conclusive determinations and adjudications of jurisdictional facts—and there must be some line—then I confess I am not able to say where it should be drawn, and I shall leave it to the supreme court, when a proper occasion arises, to definitely and sharply locate it. If the line between inconclusive and conclusive adjudications of jurisdictional facts is to be further advanced in the direction of the latter, I shall leave it to that tribunal to make the advance. I certainly shall not be the one to take the first step. If, however, the supreme court should make the advance, I shall obediently follow, but I fear with “unequal,”—*non passibus æquis*,—certainly with reluctant steps. In my judgment the community ought to be entitled to rely with some confidence upon the solemn adjudications of the superior courts of the country, and I, for one, am unwilling to take the lead in judicial action that must, in the nature of things, largely exaggerate that very general lack of confidence in the sanctity, inviolability, and validity of the judicial records of even our superior courts, which it is notorious now so widely prevails, largely depreciating the value of all titles to property resting upon judicial sales and proceedings, at least on this side of the continent.

Counsel cites section 766, clause 16, of the Oregon Civil Code, relating to disputable presumptions, as controlling the case. The only observation I have to make upon that provision of the statute is that this is not a case of presumption, but of an actual adjudication of a fact upon proper allegations and proofs—a case of *res adjudicata*.

I regret that there is no appeal, as the point involved is one that ought to be authoritatively determined, and the question forever set at rest. But the statute expressly limits the recovery in such cases to \$5,000, and that sum is, therefore, the utmost amount that can be in controversy. Or. Civ. Code, § 367.

Upon the views expressed, the petition for rehearing must be denied, and it is so ordered.

## FORSYTH and another v. VAN WINKLE and others.

*(Circuit Court, D. Indiana. November 26, 1881.)***1. EJECTMENT—NEW OR SECOND TRIAL AS A MATTER OF RIGHT UNDER THE STATE CIVIL CODE.**

In proceedings to recover possession of real property under the Civil Code of Indiana, no one not concluded by the judgment is entitled, under the Code, (section 601,) to have the judgment vacated, and a new trial granted as matter of right, upon payment of costs, etc. Such right is limited to the party against whom the judgment is entered, his heirs, assigns, or representatives.

**2. PLEADINGS—LAPSUS CALAMIT—JUDGMENT—TEST OF—RECORD.**

Where an amended complaint is filed, before answer, against a single defendant in substitution of a complaint originally filed against several defendants, upon which amended complaint trial and judgment are had, the mere mistaken or careless use of the plural "defendants" in the subsequent pleadings, and in the judgment for costs, does not conclude any one save the single defendant to the amended complaint. The judgment is to be tested by the whole record.

*McDonald & Butler*, for plaintiffs.

*C. P. Jacobs*, for defendants.

GRESHAM, D. J. The plaintiffs, Caroline M. Forsyth and Jacob Forsyth, her husband, commenced their action of ejectment in this court on the twenty-fifth of July, 1874, against Sylvaas P. Van Winkle, Richard Robinson, Charles Rose, James Lanagan, and John A. Smale, to recover possession of a large amount of real estate in Lake county, Indiana. Process was duly served on all the defendants.

On the seventeenth of December, and before appearance to the action, the plaintiffs filed, against the defendant Smale only, a separate complaint, embracing part of the lands described in the original complaint, and at the same time filed a separate complaint against the defendant Rose, embracing another part of the lands described in the original complaint. After these separate complaints were filed,—on the twentieth of January, 1875,—no answers having yet been filed to any of the complaints, the court ordered "that the said complaint against Smale stand as the complaint in this action, and that the complaint against Rose be docketed as a distinct and separate action," which was done.

To this complaint Smale filed a demurrer, which was overruled. On the thirtieth of June, 1876, it appears from the record that the "defendants" were ruled to answer. On the fourteenth of November, Smale answered the amended and separate complaint against him, and the general denial was filed for the defendants. The case was then put at issue on the special answer of Smale by a reply in general denial. The cause was heard before the court on stipulation of counsel, and the record shows that on the sixth of June, 1879, judgment was rendered for the plaintiffs against John A. Smale for the recovery of the land described in the amended complaint, and against all the

defendants for costs. On the seventeenth of March, 1880, on motion filed the day previous, an order was entered vacating the judgment, and granting a new trial under the statute as of right, the costs having been paid, and the death of defendant Smale was suggested. On the seventeenth of May, 1881, the plaintiffs entered a special appearance by counsel who had not heretofore appeared in the case, and moved the court to set aside the order vacating the judgment and granting the new trial, among other reasons because—

(1) The motion for a new trial was not made by John A. Smale, nor by his heirs, assigns, or representatives, he being the only defendant against whom a judgment of ejectment was rendered, and that Smale had died between June 6, 1879, and March 16, 1880, to-wit, in September, 1879; (2) that the motion for a new trial does not disclose that any judgment in ejectment had been rendered.

It is urged, in opposition to the motion by counsel now for the first time appearing for defendants, that Smale's co-defendants occupy such a relation to the issue which was tried by the court as to be affected by the judgment, and that, therefore, they are within the letter and spirit of the statute, which allows the unsuccessful party a new trial as matter of right; that the application for a new trial was made for the benefit of Smale's heirs as well as his co-defendants; that the statute is remedial and should be liberally construed; and that the motion to vacate comes too late.

Section 601 of the Code provides—

That the court rendering the judgment, at any time within one year thereafter, upon the application of the party against whom the judgment is rendered, his heirs or assigns or representatives, and upon the payment of all costs, and of the damages if the court so direct, shall vacate the judgment and grant a new trial.

Section 602 provides—

That if the application for a new trial is made after the close of the term at which the judgment is rendered, the party obtaining the new trial shall give the opposite party 10 days' notice thereof before the term at which the action stands for trial.

After all the defendants had been served with process, and before any of them had appeared to the action, the plaintiffs filed an amended or separate complaint, embracing only part of the lands described in the original complaint, against the defendant John A. Smale alone. Shortly after this was done the court ordered that the amended complaint should thereafter stand as the complaint in the case. The controversy was thus limited to one between the plaintiffs and the defendant Smale, so far as the lands described in the amended complaint were concerned. No issue was tendered by the amended complaint to any one but Smale, and no rights of his co-defendants in the original complaint to the land described in the amended com-

plaint and the judgment in ejectment were affected by that judgment. It is true that the suit continued to be entitled as it was originally docketed, and the word "defendants" appears at times in the pleadings and record, instead of the word "defendant," but this was, perhaps, a misuse of the plural; and the whole record sufficiently shows that the controversy which was submitted to the court was between the plaintiffs and Smale only.

After dismissing as to Smale's co-defendants, as the plaintiffs in effect did by their amended complaint,—to the extent, at least, of the lands described in that complaint,—and taking judgment against Smale alone for those lands, the plaintiffs could claim nothing under that judgment against any one but Smale. No one being concluded by the judgment but Smale, it follows that no one was entitled to a new trial but Smale, his heirs, assigns, or representatives. The judgment in ejectment, as already stated, was limited to Smale only. It is only at the conclusion of the judgment that the plaintiffs are shown to have recovered costs of the "defendants." Neither at the time of vacating the judgment of ejectment, nor at any subsequent time until to-day, has it been made to appear that Smale died leaving heirs, assigns, or representatives.

The new trial was taken at a subsequent term, and it does not appear from the record, or any evidence before the court, that the plaintiffs have lost their right to have the erroneous order granting a new trial vacated.

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BROCKWAY, Adm'r, v. MUTUAL BENEFIT LIFE INS. CO.

(Circuit Court, W. D. Pennsylvania. May, 1881.)

1. LIFE INSURANCE—"SOBER AND TEMPERATE."

The answers in the application, when made the basis of the agreement, are a material part of the contract, and, if untrue, the policy is void. But the burden of proof is on the company. The answers alleged that the applicant was sober and temperate, and had always been so.

*Held*, that the words "sober and temperate" are to be understood in their ordinary sense. They do not imply total abstinence. A moderate and temperate use of alcoholic stimulants is consistent with sobriety, but if used to such an extent as to produce frequent intoxication, the applicant is not sober and temperate.

2. EVIDENCE—NEGATIVE—POSITIVE.

Testimony of positive witnesses that they have seen the party intoxicated is not to be rejected on account of the negative testimony of others who have not.

## 3. INSURABLE INTERESTS.

No one can procure valid insurance on a life unless he has an interest in that life.

## 4. SAME.

A policy taken out nominally in the name of the assured, and for his benefit, but in reality as a cover for the benefit and in the interest of one having no insurable interest, is void.

## 5. SAME—CREDITORS.

A creditor, however, has an insurable interest in the life of his debtor, and may take out a policy upon the life of the latter, or the policy may be taken out in the name of the debtor and assigned to the creditor.

*Hon. G. M. Harding, Asst. U. S. Dist. Atty. Wilson, and Col. Knorr, for plaintiff.*

*Messrs. Dalzell, Purviance & Stoner, contra.*

ACHESON, D. J., (*charging jury.*) This is an action by Charles B. Brockway, administrator of Beckwith S. Brockway, deceased, for the use of D. F. Seybert, against the Mutual Benefit Life Insurance Company of New Jersey. The suit is upon a policy of insurance dated March 12, 1868, for the sum of \$10,000, issued by the defendant company upon the life of Beckwith S. Brockway, of Salem township, Luzerne county, Pa. On its face, the policy would seem to have been taken out by Beckwith S. Brockway on his own account. It appears to be an ordinary contract of life insurance between him and the company. By its terms, in consideration of the payment of the cash premium, and the annual premiums therein specified, the company agreed to pay the sum of \$10,000 to the executors, administrators, or assigns of Beckwith S. Brockway, within 90 days after due notice and proof of his death, and proof of interest by the party claiming the insurance money.

The plaintiff gave in evidence:

(1) A paper dated March 8, 1868, containing the "declaration" of Beckwith S. Brockway, made upon his application for insurance, and certain printed questions propounded by the company, and the written answers thereto made by Brockway, his friend, and his physician, which answers are expressly made "the basis of the contract" between Brockway and the insurance company. (2) The policy of insurance issued by the Mutual Benefit Life Insurance Company in pursuance of that application, the policy containing a receipt for \$650, the first premium. (3) A receipt dated March 12, 1869, for \$650, the second year's premium. (4) Proof of the death of Beckwith S. Brockway on December 4, 1869. (5) And it was admitted that due proofs of death and interest were furnished the company on December 27, 1869.

The plaintiff thus made out a *prima facie* case which would entitle him to your verdict, in the absence of any defence shown by counter evidence. But the insurance company has set up several defences,



and much evidence bearing thereon has been given. These defences, (so far as submitted to you,) and the evidence touching the same, both that on the part of the defence and that in rebuttal, deserve and should receive your careful and dispassionate consideration.

The "declaration" made by Beckwith S. Brockway on March 8, 1868, upon the faith of which the policy in suit issued, contains the following stipulation on his part, viz.:

"That I do not, nor will I, practice any bad or vicious habit that tends to the shortening of life. And I hereby agree that the answer made by myself, my physician, and my friend, shall be the basis of the contract between myself and the said company, and if any untrue or fraudulent allegation is contained in said answer, or this declaration, all moneys which shall have been paid to the said company on account of the assurance to be made in consequence thereof, shall be forfeited for the benefit of the company."

The answers, being thus made by the parties the basis of their agreement, became a material part of their contract, and absolutely binding upon the insured; and if any of the answers are shown to be untrue, the policy is void.

The defendant (the insurance company) alleges that several of the answers are untrue. Here it is proper for me to say that, as the defendant makes this allegation, the burden of showing that the answers are untrue is, of course, upon the company. The defendant claims that the untruth of certain of the answers has been shown by the evidence submitted to you. To the answers alleged to be untrue I will now direct your attention.

The tenth and eleventh questions addressed to Beckwith S. Brockway relate to his health; and he was asked whether he had had any of certain specified diseases or any sickness within the last 10 years. To the tenth question he answered: "Nothing but rheumatism, of a subacute type, at long intervals, and confined to the hands and finger joints." To the eleventh question he answered: "Rheumatism; nothing else." Upon the subject of his health, Brockway's "friend," Silas E. Walton, answered: "I have known him to have slight attacks of rheumatism." And the physician, Dr. R. H. Little, answered: "Has occasionally had attacks of subacute rheumatism, seldom requiring medical interference, and not confining him to the house."

These answers are alleged to be untrue. I cannot recall any evidence which shows that Beckwith S. Brockway was ever affected with any of the diseases inquired of other than rheumatism. Whether, as affecting the risk under the policy in suit, there is any essential difference between rheumatism of a subacute type, and rheumatism

of an inflammatory type, is a question to be settled upon medical testimony, and I am not persuaded that we have sufficient evidence here to solve that question. There is, perhaps, some evidence tending to show that on one occasion this disease affected his knee joints, or one of them. There is also evidence that on several occasions, when suffering from rheumatism, he was confined to the house; but it is by no means clear that this confinement occurred during the period of time covered by Dr. Little's answer. Upon the whole, I am not satisfied that there is sufficient evidence in the case to justify me in submitting to you the question, whether the answers touching the health of Brockway were untrue; and I therefore instruct you to disregard this particular defence, and to dismiss it altogether from your consideration.

The seventeenth question addressed to Beckwith S. Brockway, and his answer thereto, are as follows: *Question.* "Name and residence of the party's usual medical attendant, or of the medical attendant of his family, to be referred to for information as to his health." *Answer.* "R. H. Little, Berwick, Pennsylvania." This answer is alleged to be untrue. But I am of the opinion that the evidence upon this subject would not justify a verdict for the defendant, and I therefore instruct you to disregard and dismiss from your consideration this particular defence.

This brings us to a branch of the defence which deserves your most serious consideration. The thirteenth question propounded to Beckwith S. Brockway, and his answers thereto, are in these words: *Question.* "Is the party [Beckwith S. Brockway] sober and temperate?" *Answer.* "Yes." *Question.* "Has he always been so?" *Answer.* "Yes." The defendant alleges that these answers are untrue, and a very large number of witnesses have been examined in your presence and hearing, and many depositions have been read on the part of the defendant, to show the untruthfulness of these answers in respect to Brockway's sobriety and temperance. On the other hand, the plaintiff has submitted a great deal of testimony, oral and by depositions, to rebut the defendant's evidence on this point, and to sustain the truth of these answers.

The question of fact is for your determination: Was Beckwith S. Brockway, on March 8, 1868, the date of his declaration and answers, a "sober and temperate man? and had he been always so?" This you should decide according to the weight of the evidence. You will observe that Brockway's answers had respect not only to the date thereof, March 8, 1868, but to his whole previous life. "Is the party

sober and temperate?" "Has he always been so?" If either answer was false there can be no recovery, and there ought not to be. The truth of these answers was relied on by the insurance company. Good faith required truthful answers in respect to so important a matter as the habits of the party applying for insurance touching the use of intoxicating drinks.

The words "sober and temperate" are to be taken in their ordinary sense. The language does not imply total abstinence from intoxicating liquors. The moderate, temperate use of intoxicating liquors is consistent with sobriety. But if a man use spirituous liquors to such an extent as to produce frequent intoxication, he is not sober and temperate within the meaning of this contract of insurance.

I have said that you should be governed, in respect to the matter under consideration, by the weight of evidence. And here you should distinguish between the positive and negative evidence. If a number of credible witnesses testify that they have frequently seen a party intoxicated, or visibly under the influence of strong drink, their testimony is not to be rejected simply because an equal number of like credible witnesses testify that they never saw the party in such a condition. The testimony in the one case is positive, in the other negative, and the testimony of both sets of witnesses in the case supposed may be true. Many of the witnesses on the part of the plaintiff say that they never saw Brockway so much under the influence of liquor that he could not attend to his ordinary business. This evidence, however, does not necessarily negative the immoderate use by him of spirituous liquors.

Again, some of the plaintiff's witnesses testify that Brockway's health was not impaired by his use of intoxicating liquors. But whether or not his health was impaired is altogether immaterial, if, in fact, he was immoderate or intemperate in his indulgence in spirituous liquors.

You are to say, upon the weight of the evidence, in view of the explanations and instructions I have given you, whether Beckwith S. Brockway was sober and temperate at the date of his answers, and had always been so. If you determine this question against the plaintiff that will end the case, and your verdict will be for the defendant. But if your finding on this part of the case should be in favor of the plaintiff, you will then pass to the consideration of another branch of the defence.

It is claimed that the policy in suit is what is known as a wagering policy, and therefore void. It is a general rule of law that no one can

procure valid insurance upon a life unless he has an interest in that life. I may insure my own life, for I have an interest in it. But an entire stranger to me, one who has no interest in my life as a creditor or otherwise, cannot take out a valid policy on it. Should he procure such policy the law would condemn it as a mere wager, a bet on my life, a gambling contract, and there could be no recovery thereon. This rule prevails, not in the interest of insurance companies, not out of regard to them. The rule has its foundation in good morals and sound public policy. It has been well said of such wager policies that, "if valid, they would not only afford facilities for a demoralizing system of gaming, but furnish strong temptation to the party interested to bring about, if possible, the event insured against." The annals of crime furnish more than one instance where murder has been perpetrated by the holders of such policies that they might reap the fruits of speculative insurance upon the life of their victim. If an entire stranger to me were permitted to take out insurance on my life, his sole interest, you must perceive, would be in my speedy death. The law, therefore, wisely takes from him the temptation to bring about the event by forbidding such contract. The evils of gambling in such policies are also apparent and great, and therefore the law will not sanction insurance obtained for the purpose of speculating upon the hazard of a life in which the assured has no interest.

In the present case, as I have heretofore said, the policy on its face appears to be taken out by Beckwith S. Brockway on his own account. But it is claimed it was not intended to be what it purports, but that form was adopted as a mere cover for a wager policy in favor of Daniel F. Seybert, the use plaintiff in this case.

It appears that Beckwith S. Brockway was a shoemaker, and there is evidence tending to show that he was without pecuniary means. When he died, on December 4, 1869, there was insurance on his life to the amount of \$40,000, which, it is claimed, was out of all proportion to his station in life. There is evidence tending to show that all this insurance was taken by the procurement of Daniel F. Seybert, and for his benefit; that he (Seybert) paid all the premiums that were paid; that Seybert solicited Brockway to take out the policy in suit, and agreed to pay him \$300 for so doing; that he did pay him \$30 in cash, and gave him his two notes for \$100 each.

The defendant claims that the evidence shows that the policy in suit was taken out nominally for Brockway, but actually for Seybert, as a mere matter of speculation upon the hazard of Brockway's life;

that it was not a policy upon the life of Brockway taken out in good faith, but a mere cover for a wager policy. If you so find, there can be no recovery upon the policy, and your verdict must be for the defendant.

A creditor, however, has an insurable interest in the life of his debtor, and may take out a policy upon the life of the latter, or the policy may be taken out in the name of the debtor and assigned to the creditor. It is claimed by Seybert that this is the character of the transaction under investigation. He produces, and has given in evidence, a note dated December 26, 1867, for \$10,000, payable to him or his order one day after date, and purporting to be signed by Beckwith S. Brockway. He has also given in evidence an assignment dated March 30, 1868, from Brockway to him (Seybert) for \$8,000 of the policy in suit. He claims, you perceive, to be the creditor of Brockway, and that he was such at the time this policy was taken out, and that it was procured on account of that indebtedness. If Brockway was indebted to Seybert, as claimed by him, in the sum of \$10,000, and the policy was taken out with reference to that indebtedness, then it was not a wager policy, and this branch of the defence (if you so find the facts to be) would fail. Are you satisfied that there was such indebtedness? The note for \$10,000, purporting to be signed by Brockway, is in evidence, but its genuineness is controverted. It is for you to determine, under all the evidence, whether or not the signature to the note is the genuine signature of Beckwith S. Brockway. But if you should find that it is his signature, the vital question still remains whether it represents a *bona fide* indebtedness. Did Brockway actually owe Seybert \$10,000, or is this note but a part of the alleged confederacy between Brockway and Seybert, whereby the latter was to take out a merely speculative insurance upon the life of the former?

Upon this branch of the case Seybert relies upon the note itself, and has given no other evidence to show the alleged indebtedness, or how or when it originated. Mrs. Cooper testifies that she was present when the note was signed; but she is silent as to everything beyond the mere fact of the signing of the note by Brockway. In the absence of any testimony by Mrs. Cooper as to the payment of any money by Seybert to Brockway, or the passing of any consideration at the time the note was executed, it is reasonable to assume that no consideration then passed between the parties. I cannot recall any evidence whatever, aside from the note itself, tending to show the alleged indebtedness.

The defendant insists that, in view of Brockway's pecuniary circumstances and his station in life, it is highly improbable that he could be *bona fide* indebted to Seybert for so large an amount as \$10,000. It is further urged that if any such indebtedness in fact existed, it was in the power of Daniel F. Seybert, the use party plaintiff, to show that indebtedness, to prove the consideration for which the note was given, and that the entire absence of such evidence raises a strong presumption against the *bona fides* of the note. It is for you to say what weight should be given to these considerations, which the defendant's counsel have pressed upon you.

The case, as submitted to the jury, turns upon the determination of two questions of fact. The one relates to the habits of Brockway in respect to sobriety; the other has regard to the character of the policy in suit.

(1) Was Beckwith S. Brockway, on March 8, 1868, "sober and temperate," and had he always been so?

(2) Was the policy in suit a *bona fide* risk upon the life of Brockway, or was it merely a speculative transaction on the part of Seybert—a wagering policy?

If you find both these questions of fact in favor of the plaintiff, your verdict will be for the plaintiff. But if your finding upon these questions of fact, or upon either of them, is against the plaintiff, your verdict must be for the defendant.—[*Ins. Law J.*

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### STRETTELL v. BALLOU and others.

(Circuit Court, D. Colorado. October 15, 1881.)

#### 1. MINERAL LANDS — CLAIM — PARTITION — CIRCUIT COURT — JURISDICTION IN EQUITY.

The jurisdiction in equity of the circuit court of the United States is derived from the constitution and laws of the United States alone. Hence, a bill for partition, brought in the circuit court by the owner of an undivided interest in a mining claim, will be dismissed for want of jurisdiction, as the title to the land remains in the United States.

*M. B. Carpenter*, for complainant.

*Dixon & Reed*, for respondent.

McCrary, C. J. It has long been settled that the jurisdiction of the circuit courts of the United States in equity is derived from and defined by the constitution and laws of the United States; that it is the same in all the states, and is not to be affected or varied by the various statutes of the states, whereby the chancery powers and jurisdiction of state courts may be defined and regulated. This court

cannot, therefore, look to any state legislation as the source of its jurisdiction in equity. In *Boyle v. Zacharie*, 6 Pet. 658, Chief Justice Marshall, speaking for the supreme court, thus stated the rule: "And the settled doctrine of this court is that the remedies in equity are to be administered, not according to the state practice, but according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law, subject, of course, to the provisions of the acts of congress, and to such alterations and rules as, in the exercise of the powers delegated in those acts, the courts of the United States may from time to time prescribe." And see, to the same effect, *Robinson v. Campbell*, 3 Wheat. 212; *U. S. v. Howland*, 4 Wheat. 115; *Neves v. Scott*, 13 How. 271; *Noonan v. Lee*, 2 Black, 499; *Johnson v. Roe*, 1 McCrary, 162.\* It follows, from these authorities, that, unless the jurisdiction of this court can be derived from the constitution and laws of the United States alone, it does not exist.

Section 913 of the Revised Statutes of the United States declares that the modes of proceeding in equity causes shall be according to the principles, rules, and usages which belong to courts of equity, as contradistinguished from courts of law; and this language refers to the principles, rules, and usages by which the high court of chancery of England was governed at the time the judiciary act was passed.

It is very clear that, according to the general principles of equity jurisprudence, as administered in England at the time of the passage of the judiciary act, and as administered by courts of chancery in this country, except where a different rule is adopted by statute, the holder of a mere possessory interest in land, and not having title thereto, cannot maintain a bill for partition. Such a bill must be filed by one having title to a portion of the premises sought to be partitioned. *Horncastle v. Charlesworth*, 11 Simons, Ch. 314; *Williams v. Wiggand*, 53 Ill. 233; *Ross v. Cobb*, 48 Ill. 111.

It is not claimed that there is any act of congress conferring upon this court jurisdiction in equity of a bill for partition brought by the owner of an undivided interest in a mining claim where the legal title to the real estate remains in the United States. It follows that this bill must be dismissed for want of jurisdiction. If the statutes of the state of Colorado, relied upon by counsel for complainant, confer jurisdiction upon the courts of the state in a case of this character, the complainant must resort to those courts.

\*S. C. 1 FED. REP. 692.  
v.9,no.5—17

## BROWN, Assignee, etc., v. THE JEFFERSON COUNTY NAT. BANK.

(Circuit Court, N. D. New York. June 21, 1881.)

**1. BANKRUPTCY—ILLEGAL PREFERENCES.**

Proof of the existence of a desire on the part of the debtor that a particular creditor may succeed by the usual proceedings in a suit in obtaining a preference over other creditors, so that such preference may be maintained even as against proceedings in bankruptcy which may be subsequently commenced, is insufficient to establish that the debtor procured or suffered his property to be taken on legal process with intent to prefer such creditor.

**2. SAME—SAME—AGENT—NOTICE.**

A national bank, having reasonable cause for believing that a party whose paper it had discounted was insolvent, instructed a firm of attorneys, who were its debtors' attorneys, though of this it was not aware, to proceed to collect its debt. By the collusion of the debtors they were enabled in due course of judicial proceedings to obtain judgments and levy executions before the institution of proceedings in involuntary bankruptcy by the other creditors. *Held*, that the knowledge of the attorneys, though unknown to their principals they had peculiar facilities for obtaining information, so long as it was obtained about their employment was the knowledge of the bank, since disclosure would involve no breach of professional confidence; and that the judgments and levies were void as against an assignee in bankruptcy.

*G. W. Adams*, for plaintiff.

*Levi H. Brown*, for defendant.

BLATCHFORD, C. J. The district judge, in his decision in this case, says that "this is evidently a case where the bankrupts, in contemplation of insolvency, desired to secure their indorsers and the defendant, and, through the advice of their attorneys, concluded to do it by means of judgments and executions," and that "the attorneys employed to bring actions and obtain judgments were the bankrupts' attorneys." The mere existence of a desire on the part of a debtor, however strong such desire, that a particular creditor may succeed by suit, judgment, execution, and levy in obtaining a preference over other creditors, so that such preference may be maintained, even as against proceedings in bankruptcy which may be subsequently commenced, is not sufficient to establish that the debtor procured or suffered his property to be taken on legal process, with intent to prefer such creditor, if the proceedings of the creditor were the usual proceedings in a suit, unaided by any act of the debtor either by facilitating the proceedings as to time or method, or by obstructing other creditors who otherwise would obtain priority. This doctrine was firmly established by *Wilson v. City Bank*, 17 Wall. 473, and other cases which succeeded it. The absence of the inhib-



ited intent on the part of the debtor leaves the creditor's levy to stand, even though the creditor had reasonable cause to believe, when the property was taken, that the debtor was insolvent, and then knew that a preference was being secured as against other creditors. There is nothing in *Wilson v. City Bank*, or in any other case, which sanctions the view that the mere existence of a desire on the part of the debtor that the creditor may secure and maintain the preference, although concurrent with the not interposing any hindrance to the suit and the levy, is a procuring or suffering of the levy with the forbidden intent. In that case the debtors were insolvent when the suit was brought, and the creditor then had reasonable cause to believe they were insolvent, and knew that they had committed an act of bankruptcy.

The case of *Wilson v. City Bank* arose under the act of March 2, 1867, (14 St. at Large, 534, 536.) The thirty-ninth section used the words "procure or suffer his property to be taken on legal process, with intent to give a preference," etc. The thirty-fifth section used the words, "with a view to give a preference to any creditor \* \* \* procures any part of his property to be \* \* \* seized on execution." The court said that as both of these sections had the common purpose of making such preferences void, and both of them made the illegality to depend on the intent with which the act was done by the bankrupt and the knowledge had by the other party of the bankrupt's insolvent condition, and as both of them described substantially the same acts of payment, transfer, or seizure of property so declared void, it was very strongly to be inferred that the act of *suffering* the debtor's property to be taken on legal process in section 39 is precisely the same as *procuring* it to be attached or seized on execution in section 35. The court also noted the fact that the word "procure" and the word "suffer" were both of them used in section 39. In the Revised Statutes, section 5021 contained a re-enactment of the above part of section 39 of the act of 1867, using the words "procures or suffers." By section 12 of the act of June 22, 1874, said section 39, and consequently said section 5021, was amended by striking out the words "or suffer," so as to read "procure his property to be taken on legal process, with intent to give a preference," etc. In the Revised Statutes, section 5128 contained a re-enactment of the above part of section 35 of the act of 1867, but altered the word "procure" to the words "procures or suffers." The amendatory act of June 22, 1874, did not amend section 35 of the act of 1867 as to the above language. The Revised Statutes were enacted June 22, 1874. Thus, apparently

on one and the same day, congress altered section 39 by striking out "suffer," and altered section 35 by inserting "suffer." It is provided by section 5601 of the Revised Statutes that the enactment of the Revision is not to affect any act of congress passed since December 1, 1873, and that all acts passed since that date are to have full effect as if passed after the enactment of said Revision, and that, so far as such acts vary from or conflict with any provision contained in said Revision, they are to have effect as subsequent statutes, and as repealing any portion of the Revision inconsistent therewith.

In view of this last enactment, and of the construction thus given by the supreme court to section 35 and section 39, and in consonance with the general rules for the construction of statutes, and the special rules applicable to the construction of said Revision, the provisions of the amendatory bankruptcy act of June 22, 1874, so far as they, in amendment of section 39 of the act of 1867, vary from or conflict with any provision contained in section 35 of the act of 1867, and in section 5128 of the Revised Statutes, enacted June 22, 1874, must be held to have effect as provisions enacted subsequently to the Revised Statutes, and as repealing any provision of section 35 of the act of 1867 and of section 5128 of the Revised Statutes that is inconsistent with such provisions of such amendatory bankruptcy act. In this view, the word "suffer," being distinctly and affirmatively eliminated by section 12 of said amendatory bankruptcy act from section 39 of the act of 1874, and from section 5021 of the Revised Statutes, the word "suffers," as distinguished from "procures," as giving a ground of action to the assignee, must be held to be eliminated also from section 5128 of the Revised Statutes, it not having been in section 35 of the act of 1867. This is necessary because of the common purpose and character of the two provisions, as defined in *Wilson v. City Bank*; and because, otherwise, the enactment of section 5128 would be allowed, contrary to section 5601, to affect the provisions of section 12 of the amendatory bankruptcy act of June 22, 1874; and because, otherwise, that act, if passed *before* the Revised Statutes, would not have as full effect as if passed *after*; and because, otherwise, as the provisions of said section 12 thus vary from, and are in conflict with, such provision in section 5128, they could not have effect as a subsequent statute, and as repealing said part of section 5128, which is inconsistent with said provisions of said section 12. If the amendatory bankruptcy act of June 22, 1874, was passed *after* the Revised Statutes, the word "suffers" must, necessarily, be stricken out from section 5128, because it is thereby stricken out from section 39 of the act of

1867, and from section 5021. In either view, the word "suffer" disappeared entirely from the bankruptcy statute when the amendatory bankruptcy act of 1874 was enacted.

But aside from this, the only other view would be that, if the effect of section 12 of said act of 1874 is only to strike out the word "suffer" from section 39 of the act of 1867, and the word "suffers" from section 5021, leaving the word "suffers" in section 5128, although the word "suffer" was not in section 35 of the act of 1867, we have simply a reversal of the state of things commented on in *Wilson v. City Bank*. We have "procures" or "suffers," in section 5128, still in force—that section representing section 35 of the act of 1867; and we have only "procures" without "suffers" in section 5021—that section representing section 39 of the act of 1867, as amended by section 12 of the said act of 1874. In *Wilson v. City Bank* we had "procure or suffer" in said section 39, and we had "procures" alone, without "suffers," in said section 35. In this state of things the same ruling that was made in *Wilson v. City Bank* would apply to the transposed enactments, and the strong inference would be that the act of suffering the debtor's property to be attached or seized on execution, in section 5128, as representing said section 35, is precisely the same as *procuring* it to be taken on legal process, in said section 39, as so amended. So, in any event, practically, the word "suffer" is abolished and the word "procure" alone remains. Moreover, the history of the legislation and of the judicial decisions on it shows that the word "procure" cannot have attached to it any of the meaning which properly attached to the word "suffer," as distinguished from the word "procure." In *Wilson v. City Bank* it was said by the court that the act of suffering or the act of procuring, which are the same, must be accompanied by the intent specified in the statute; that in both there must be the positive purpose of doing an act forbidden by the statute, and the thing described must be done in the promotion of such unlawful purpose; that the facts of that case did not show any positive or affirmative act of the debtors from which such intent might be inferred; that through the whole of the legal proceedings against them they remained perfectly passive; that they owed a debt which they were unable to pay when it became due; that the creditor sued them and recovered judgment, and levied execution on their property; that they afforded him no facilities to do this, and they interposed no hindrance; that it cannot be inferred that a man intends, in the sense of desiring, promoting, or procuring it, a result of other persons' acts, when he contributes nothing to their

success or completion, and is under no legal or moral obligation to hinder or prevent them; that all the other modes of preferring creditors found in direct context in the statute are of a positive and affirmative character, and are evidences of an active desire or wish to prefer one creditor to others, and that a passive indifference and inaction, where no action is required by positive law or good morals, cannot be construed into such a preference as the law forbids.

The summary by the court of its conclusions was:

"(1) That something more than passive non-resistance of an insolvent debtor to regular judicial proceedings, in which a judgment and levy on his property are obtained when the debt is due and he is without just defence to the action, is necessary to show a preference of a creditor, or a purpose to defeat or delay the operation of the bankrupt act; (2) that the fact that the debtor, under such circumstances, does not file a petition in bankruptcy, is not sufficient evidence of such preference, or of intent to defeat the operation of the act; (3) that, though the judgment creditor in such case may know the insolvent condition of the debtor, his levy and seizure are not void, under the circumstances, nor any violation of the bankrupt law; (4) that a lien thus obtained by him will not be displaced by subsequent proceedings in bankruptcy against the debtor, though within four months of the filing of the petition."

In the present case the illegality of the levy is sought to be maintained on the ground of a distinction between the facts in this case and those in *Wilson v. City Bank*. It is contended that in this case evidence exists of a wish or design on the part of the debtors to give the creditor a preference, or oppose or delay the operation of the bankruptcy statute, and stress is laid upon these remarks of the court in *Wilson v. City Bank*:

"Undoubtedly, very slight evidence of an affirmative character of the existence of a desire to prefer one creditor, or of acts done with a view to secure such preference, might be sufficient to invalidate the whole transaction. Such evidence might be sufficient to leave the matter to a jury, or to support a decree, because the known existence of a motive to prefer or to defraud the bankrupt act would color acts or decisions otherwise of no significance. These cases must rest on their own circumstances. But the case before us is destitute of any evidence of the existence of such a motive, unless it is to be imputed as a conclusion of law from facts which we do not think raise such an implication."

In that case the debtors were insolvent when the suit was brought. The creditor had then reasonable cause to believe it, and knew that the debtors had committed an act of bankruptcy, and that they had no property but the stock of goods, which the creditor afterwards levied on. The debtors gave no notice to any of their creditors that the suit had been brought, and, having no defence to it, did not de-

send it or go into voluntary bankruptcy, nor otherwise make any effort to prevent the judgment or the levy.

In order to see whether there is any legal distinction between the facts in that case and those in the present case it is important to see under what circumstances, in cases since *Wilson v. City Bank*, the supreme court has held cases of executions on judgment to be valid or invalid preferences.

In *Little v. Alexander*, 21 Wall. 500, the bankrupt gave a note to his son for an old debt and interest, and for a new sum then first loaned, the debtor then being known to be insolvent, under such circumstances that, under a recent statute, the creditor could obtain a judgment on the note at an earlier time than he could have obtained a judgment for the old debt without the note. It was held that the purpose of the transaction was to give the son a judgment before other creditors on old debts. It was contended that because the debtor had no defence, and made none, the case was within *Wilson v. City Bank*, but the court said:

"No careful reader of that case can fail to see that if the debtor there had done anything before suit which would have secured the bank a judgment with priority of lien, with intent to do so, the judgment of this court would have been different from what it was."

This implies that an overt act in aid of the judgment is necessary, and that the existence of a wish, unaccompanied by any such overt act, is not equivalent to the statutory intent.

In *Nat. Bank v. Warren*, 96 U. S. 539, it was contended for the creditor that the case was identical with *Wilson v. City Bank*, while the assignees in bankruptcy contended the contrary. The court said: "This action goes upon the theory that the mere non-resistance of a debtor to judicial proceedings against him when the debt is due, and there is no valid defence to it, is the suffering and giving a preference under the bankrupt act. This theory is expressly repudiated in the case of *Wilson v. City Bank*, 17 Wall. 473. It is also held in that case that the facts that the debtor does not himself file the petition in bankruptcy under such circumstances, and that the creditor was aware of the insolvency of the debtor, do not avoid the judgment and execution. In the present case there is not proven a single fact or circumstance tending to show a concurrence or aid on the part of the debtors in obtaining the judgment or securing the payment of the debt." The meaning of this is that there must be acts in concurrence or in aid—acts which promote or secure the judgment or the levy to a tangible degree or extent—which would not have ex-

isted but for such act, and that it is not enough to show merely a mental state of acquiescence or satisfaction or approval, in view of the prospect that the judgment and the levy will result in a preference. There must be enough to warrant the court in saying that the debtor did something towards procuring the preference, and did it with intent that there should be the preference. *London v. First Nat. Bank*, 15 N. B. R. 476, 483; *Will v. Hereth*, 13 N. B. R. 106; *In re Runyi*, 3 FED. REP. 790; *Darling v. Townsend*, 5 FED. REP. 176.

Five judgments in favor of the Jefferson County National Bank, amounting to \$7,968.06, were recovered against the debtors on the sixth of April, 1877, and executions were issued and levied on the debtor's property on that day. Afterwards, on the same day, a petition in involuntary bankruptcy was filed against the debtors. The judgments were recovered in suits regularly commenced and prosecuted, as adversary suits, by summons and complaint, and the proceedings were, as to manner and time, all in accordance with the usual practice under the laws of New York. The summonses and complaints were served by the sheriff March 16, 1881, and the full time for the defendants to answer expired before the judgments were entered. The suits were brought on commercial paper, drawn, made, or indorsed by the bankrupts. It is conceded that the debtors were insolvent when the suits were commenced. The bill alleges that the suits were commenced "with the assent, connivance, and procurement" of the debtors, and that the debtors "did procure and suffer" their property to be seized on the executions with intent to give a preference to the bank, a creditor of them, and who had reasonable cause to believe them to be insolvent, and knew that a fraud on the bankruptcy act was intended. Under an order made by the district court in bankruptcy, the property levied on was sold, and the net proceeds, \$9,351.50, were deposited, subject to the order of said court. The district court made a decree in this suit, decreeing the judgments and executions to be void as against the plaintiff, and that the \$9,351.50 belongs to the plaintiff, and awarding to him his costs of this suit.

It is contended for the plaintiff that the bankrupts procured their property to be seized on the executions, and that they were not passive, but positive and active, in their efforts to procure and secure the preferences. Henry V. Cadwell, one of the debtors, testifies that he understood they could be put into bankruptcy 40 days after their paper had gone to protest, and that he desired the judgments to mature before a petition in bankruptcy should be filed against them.

The question is whether the debtors acted on such desire, and whether they did or said anything which efficiently contributed to the postponement of the filing of the petition in bankruptcy until after the judgments had ripened into executions. This could be done as well by delaying the bankruptcy proceedings until after the judgments had matured in the regular cause, as by speeding the entry of the judgments before their regular time. The debtors contemplated making a voluntary assignment of all their property for the benefit of their creditors, and H. V. Cadwell testifies that they intended to let the judgments mature, so that executions on them should be issued before such assignment should be executed. The other two debtors testify to the same effect. The voluntary assignment was made on the sixth of April, 1877, and was recorded in the county clerk's office one hour and three-quarters after the executions were levied, and one hour and a quarter after the petition in bankruptcy was filed. The judgments were entered at 8 o'clock A. M.; the executions were levied at 8½ o'clock A. M.; the petition in bankruptcy was filed at 9 o'clock A. M.; and the voluntary assignment was recorded at 10¼ A. M. The attorneys for the bank in the suits were McCartin & Williams. McCartin & Williams had been attorneys for the debtors for some years, and were consulted by them about their financial affairs and embarrassments after the suits were brought, and as to what was best to be done. McCartin & Williams also drew the voluntary assignments. There is no evidence that any suggestion to the bank that it ought to sue came from the debtors, or from McCartin & Williams. Nothing appears to have been done by McCartin & Williams, or by the debtors, to facilitate the suits or the entry of the judgments. Failing sooner to make a voluntary assignment was no facilitation of the judgments, as respected any rights of the assignee in bankruptcy, nor would it have been, even if the voluntary assignment had preceded the petition in bankruptcy. As it was, the petition in bankruptcy preceded the voluntary assignment. Failing to file a voluntary petition in bankruptcy was, legally, no facilitation of the judgments, and, notwithstanding the wish on the part of the debtors that the judgments should precede an involuntary petition in bankruptcy, the question still remains whether there were any things said or done by the debtors, or by McCartin & Williams, influencing the action or non-action of the creditors who ultimately filed the petition in bankruptcy, which hindered the filing of such petition until after the judgments were recovered.

The plaintiff, Mr. John G. Brown, whose firm was at the time a

creditor of the debtors, and Mr. Daniel N. Crouse, whose firm, also, was at the time a creditor of the debtors, had an interview with Henry V. Cadwell on the twenty-second of March, 1877, at the store of the debtors, and asked him for a statement of the affairs of the debtors. He declined to make one except in the presence of his attorneys, McCartin & Williams. Afterwards, in the presence of McCartin & Williams, he declined to make any statement except as to liabilities. The same persons, Mr. Brown and Mr. Crouse, with their attorney, had an interview with Henry V. Cadwell on the thirtieth of March, 1877, at the store of the debtors. One of them asked him if he had been sued, and he named three suits, saying that he had been sued for a small amount, but not naming the suits by the bank. He also declined to answer, except in the presence of McCartin & Williams, as to whether he had paid a certain note of \$600 since he had stopped payment. Afterwards, in the presence of one of said attorneys, and on his advice to that effect, H. V. Cadwell declined to answer as to that matter. On the part of the plaintiff it is testified that in reply to an inquiry made of H. V. Cadwell, in the said interview of March 30th, as to whether the firm had been sued by any one but the three named, he said that they had not been sued by any one else; that in an interview on March 30th between Mr. Crouse and Mr. Brown and said attorneys, one of said attorneys said to Mr. Crouse that they should allow no judgments of any amount to be taken against the debtors; that one of said attorneys, when asked by Mr. Crouse, at said interview, whether any one had sued the debtors, inquired "if we wanted to put them into bankruptcy;" that the reply was, "I told him I did—if we could get any points we wished to file a petition;" that Mr. Crouse, at said interview, asked one or both of said attorneys if the debtors had been sued by other parties, and they denied knowing anything about it; and that H. V. Cadwell said to Mr. Crouse that he declined to answer any question except in the presence of McCartin & Williams.

H. V. Cadwell testifies that McCartin & Williams were his attorneys when Mr. Brown and Mr. Crouse came to see him; that he told them that his attorneys advised him not to talk with them about his matters; and that he advised and consulted with McCartin & Williams about the affairs of the debtors during the time between the two visits of Mr. Brown and Mr. Crouse. He does not deny being asked by Mr. Crouse if he had been sued, and admits that he told Mr. Crouse that he had been sued by so and so; but denies that he said "only" by so and so. He admits that at the first visit he re-



fused to give Mr. Brown any information whatever, and did not give Mr. Crouse any more than he could help; that his said attorneys had told him that the least he answered the better it would be for him; and that he did not tell Mr. Crouse or Mr. Brown that the bank had sued them. He says, "I kept that to myself."

Mr. Brown testifies that he and Mr. Crouse, both of whom resided at Utica, went from there to Watertown on the thirtieth of March for the purpose of getting information to put the debtors in bankruptcy; that while at Watertown at that time they got such information; and that they proceeded to put them into bankruptcy.

The petition in bankruptcy is brought by seven copartnership firms, composing a firm of which Mr. Crouse was a member, and a firm of which Mr. Brown was a member. The debt to Mr. Crouse's firm is set forth as one note maturing March 30th, and one maturing April 29th. The debt to Mr. Brown's firm is set forth as one note maturing March 18th, one April 11th, one April 15th, and one May 7th, and an open account for goods sold. The acts of bankruptcy alleged in the petition are the preferential payment by the debtors, on the twenty-second of March, to one Normander, of about \$600, he being liable as indorser on a note of theirs, and the fraudulent stoppage of payment by the debtors on the twenty-second of March.

It is alleged in the petition that the debtors "decline to give your petitioners any statement of their affairs, or how they stand, or what they can pay, but refer your petitioners to their lawyers, Messrs. McCartin & Williams, who also decline to give your petitioners any statement of said alleged bankrupts' affairs;" and that the debtors "are trying in some way to make away with their property, either to secure their confidential debts, or in some other manner to defraud their creditors." The petition was verified by Mr. Crouse and Mr. Brown, and two other creditors, on the fourth of April, and by a fifth creditor on the fifth of April. No defence appears to have been made to the petition, as the adjudication was made on the return-day of the order to show cause.

These facts make out a case of the procuring, by the debtors, of the taking of the property on execution. The creditors obtained, on the thirtieth of March, the necessary information to put the debtors into bankruptcy. They inquired of H. V. Cadwell about a payment by the debtors of a note of theirs for \$600, and were met by his refusal to answer; such refusal being distinctly advised by McCartin and Williams. Presumably this was with a view to a petition in bankruptcy, as such a payment of \$600 is alleged as an act

of bankruptcy in the petition. The creditors were also misled by what amounted, substantially, to a declaration by H. V. Cadwell and by McCartin and Williams that the bank had not brought the suits in question, and by the declaration of McCartin and Williams that they, acting for the debtors, and in their interest, and with fairness towards the inquiring creditors, would allow no judgments of any amount to be taken against the debtors. McCartin & Williams were distinctly informed, on behalf of Mr. Brown and Mr. Crouse, that they desired the information they were seeking with a view to action in reference to putting the debtors into bankruptcy. H. V. Cadwell, acting and speaking for the debtors, misled Mr. Brown and Mr. Crouse by what he said on the question of the suits by the bank, and did so intentionally, to secure the consummation of his desire that the judgments should precede a petition in bankruptcy.

McCartin & Williams, occupying the double position of attorneys for the debtors and attorneys for the bank, and holding themselves out to Mr. Crouse and Mr. Brown solely as attorneys for the debtors, and not making known their position as attorneys who had brought the suits for the bank, allowed H. V. Cadwell to say, and themselves said, to Mr. Crouse and Mr. Brown what amounted, in substance, if it did not in words, to an affirmative statement that the suits which they had brought for the bank had not been brought. This amounted to affirmative action and procuracy by the debtors, and by McCartin & Williams acting for them and on their behalf, and also on behalf of the bank. The purpose was, and the effect was, to delay the execution of the announced intention to put the debtors into bankruptcy until the judgments should have matured. It must be presumed, under the circumstances, unless the contrary is shown, that if Mr. Brown or Mr. Crouse had been informed on March 30th of the suits by the bank, the petition in bankruptcy would have been filed during the six days which elapsed between March 30th and April 6th. As it was it was filed only half an hour after the levy. Mr. Brown testifies that they got the information on March 30th on which the petition was filed. Mr. Brown testifies that the debts proved against the bankrupts amount to \$24,206.22. The creditors' petition shows that the debts set forth in it, to the seven creditors who bring it, amount to \$8,152.19; that all of these debts were contracted before March 30th except one to Nill & Jess for \$41.13, which was contracted March 31st; and that Nill & Jess were creditors to the amount of \$983.47, in addition to the \$41.13, for debts contracted before March 30th. Therefore, not only were the debts set forth in the petition

more than one-third of the \$24,206.22, but such debts, less the \$41.13, were more than one-third of the \$24,206.22, less the \$41.13; and the petitioning creditors were the same in number, excluding the \$41.13, so that the petition would have been effective on the thirty-first of March, excluding the \$41.13.

The proof shows that all which McCartin & Williams said to Mr. Crouse or Mr. Brown, in regard to the affairs of the debtors, was said as representing the debtors, and was authorized by them. Therefore, the debtors are bound not only by what H. V. Cadwell said, but by what McCartin & Williams said. What was so said is competent evidence to affect the bank on the question as to the procuring by the debtors. On that question the intent of the debtors, in connection with the fact as to what they said or did themselves or by their authorized agents, as an element in procuring their property to be seized, is the vital question, and the proof must necessarily be as to what the debtors said and did, showing intent and having the effect to bring about such procuring, aside from the other things made essential by the statute. Such proof is independent proof of the *status* and action of the debtors, aside from proof as to the *status* of the creditor in respect to reasonable cause to believe insolvency, and knowledge that the transaction was intended to be and would be preferential. It must be held that the necessary proof has been made as to the intent and procurement by the debtors, and by competent evidence.

In regard to the *status* of the bank, Mr. Camp, the president of the bank, in his testimony, says that he did not know before he sued the Cadwells that McCartin & Williams were their attorneys; that McCartin & Williams had previously had one suit for the bank, it having no regular attorney; that he brought the suits mainly on his own judgment of what was best, without any suggestions from any one as to suing, and took the notes sued to McCartin & Williams; that he sued them because they failed to pay the paper as it became due, but he had no reason to suppose they were not just as able to pay as ever before; that the suits comprised their entire liabilities to the bank, and the bank had never sued them in that way before; that they had been sued before by the bank on notes, and had taken up the notes when sued; that when he now sued, his confidence in their financial ability was less than before, because they had declined to pay paper which they had promised to pay, and had failed to meet their obligations as they matured in the bank, and their obligations in the bank were increasing, and that during the winter of 1877 H. V. Cadwell

told him that the firm was good for \$5,000 over and above all its indebtedness, and he believed him.

The suits were commenced March 16th. The earliest indebtedness sued on in them became due as early as February 11th; \$2,682.81 of it fell due in February; \$4,833 of it fell due in March, \$3,000 on the fifteenth of March. Under the statute, the question is as to the insolvency of the Cadwells when the property was taken on the executions, and as to what the bank had at that time reasonable cause to believe, and what it then knew,—not as to insolvency at an earlier time, or reasonable cause to believe, or knowledge at an earlier time. The debtors stopped payment before the first of April. The day the bank sued them, or the day before that, Mr. Camp informed H. V. Cadwell that the bank was going to sue them. There can be no doubts that the debtors were insolvent on the sixth of April, at 8:30 o'clock A. M., when the execution was levied. The total assets have turned out to be \$2,296. Prior to the sixteenth of March they had failed, from want of means, to pay their business debts as they matured in the usual course of business. They were insolvent on the sixteenth of March. About the middle of February H. V. Cadwell commenced conversing with Mr. Camp about his affairs. The bank was a creditor of theirs. H. V. Cadwell tells the story thus:

"I wanted more money. I went into the bank one day. It was like this: I sent my deposit up by one of my help at the store. Mr. Woolworth, the cashier, was busy, and he left it. Pretty soon Mr. Camp sent word he wanted to see me, and I went up there. Mr. Camp threw out \$1,100 in paper I wanted discounted. I called him one side and found in bank \$1,500 in past-due paper, in addition to the \$1,100 I had to place to credit, and which he had thrown out. I told him I could not get along without having that \$1,100 discounted. He then wanted me to take up some of the past-due paper. I promised to give him a bond of indemnity. Had no security but my own indorsements. I then went home and looked my matters over. I thought the firm was worth \$10,000, but when I came to look matters over I found I was not worth as much as I thought. After a time, at the same interview, they [the bank] put the \$1,100 to my credit. He wanted a statement. I did not make a statement, but considered myself worth \$5,000. After the conversation the past-due paper continued to accumulate, and I promised if he would give me an additional discount of about \$3,000 I would take up the past-due paper and the \$3,000 when it became due. I did take up the past-due paper, but did not take up the \$3,000. He allowed me to waive protest on the note at my request. He would not renew it, and it lay past due."

Then the suits were brought. The \$3,000 referred to is, undoubtedly, that which fell due March 15th, from notes of \$750 each. They were made February 12th by the debtors, payable one month

after date, and were indorsed by four several persons. This shows what Mr. Camp knew on the twelfth of February. He does not contradict it. It shows that he, and, therefore, the bank, had abundantly reasonable cause to believe, on the sixth of April, that the Cadwells were insolvent.

H. V. Cadwell testifies as follows:

"McCartin & Williams had been our attorneys for some years; that is, for the firm. They had charge of our collections in all matters of any importance. They were our attorneys during our financial embarrassments during the spring of 1877. He advised and consulted with them in relation to our affairs during the whole time of our financial troubles. We counselled with them about our affairs before we were sued by the bank. We talked and conferred with them about our embarrassment before that time. We advised with them as to what was best to be done. About that time I talked with Mr. Williams in regard to bankruptcy, but whether it was before or after we were sued by the bank I would not state. One or both of the firm of McCartin & Williams advised bankruptcy."

Whether this conversation about bankruptcy was before or after March 16th, it was, necessarily, before April 6th. If McCartin & Williams believed that the Cadwells were subjects for bankruptcy, they knew they were insolvent, and that a seizure of their goods on judgment by the bank would be preferential, and a fraud on the statute. H. V. Cadwell testifies that during the time between the bringing of the bank's suits and the sixth of April, McCartin & Williams were in consultation with him about his matters and advised with him, and in the main he followed their advice; and does not remember that he took counsel anywhere else. He also testifies that after the bank's suits were brought he told McCartin & Williams that the debtors intended to let the judgments mature before the assignment should be made, so that a lien should first be got by execution, and that he so arranged it with McCartin & Williams. They appeared as attorneys for the Cadwells on the return-day of the order to show cause in the bankruptcy petition. All the evidence goes to show that McCartin & Williams, as representing the bank, were acting in concert with the debtors to secure the preference for the bank, and that, with the knowledge and assent of McCartin & Williams, the debtors, knowing that McCartin & Williams were attorneys for the bank, and were seeking such preference for the bank, acted wholly under the advice of McCartin & Williams, and took such course as would secure such preference, by abstaining from making an assignment, and by concealing from Mr. Crouse and Mr. Brown knowledge of the suits by the bank, and by refusing information,

when asked by them, on material matters, and by misleading them as to the bank's suits, and by thereby inducing them not to hasten the bankruptcy proceedings which they had announced they intended to institute. Discussion of the law as to how far the bank is bound by the knowledge of McCartin & Williams, is rendered unnecessary by the recent decision in *Rogers v. Palmer*, 102 U. S. 263. In that case an attorney procured a judgment by default in favor of a client against a person of whose insolvency and intent to commit a fraud on the bankruptcy law he had knowledge, and it was held that that knowledge was imputable to the client. The rule laid down in that case is that where a creditor employs an attorney to collect a note the attorney becomes his agent, and the acts of the attorney, and his knowledge obtained in the course of the employment, become the acts and the knowledge of the principal; and that where the attorney and the debtor are aware of the insolvent condition of the latter, and are co-operating to have his property seized on execution before the bankruptcy law can be enforced, and with intent to defeat its operation on the debtor's property, there is a fraud on the bankrupt law where the debtor contributes actively to that end.

The evidence in this case shows such knowledge and co-operation by H. V. Cadwell and McCartin & Williams, with such intent, and an active contribution to the preferential end by the debtor and the attorneys. To say that the knowledge which came to McCartin & Williams came to them because they were attorneys for the debtors on a prior employment, does not help the case. They were none the less acting for the bank, and the facility they had, through their employment for the debtors, to do just what was done in this case to secure the preference, is no mitigation; otherwise, all that a creditor seeking a preference need do, is to employ the debtor's prior attorney. The assignee in bankruptcy is entitled to the benefit of the principle that the bank is chargeable with the knowledge of what McCartin & Williams acquired a knowledge of while their employment by the bank was in force, no matter how such knowledge is acquired, and with their acts in pursuance of knowledge so acquired. It cannot vary this principle that the bank may not have known until after the levies that McCartin & Williams were attorney for the debtors. The principal is chargeable with the knowledge of the agent, even though ignorant of the peculiar facilities possessed by the agent for acquiring such knowledge. The natural knowledge of McCartin & Williams as to the insolvency of the Cadwells, and as to their design to prefer the bank, and as to the measures taken which

secured such preference, was acquired by McCartin & Williams after the suits by the bank were brought.

It is contended for the bank that to give a decree against it in this case requires a violation of the salutary and well-settled principle that communications made to an attorney in the course of any personal employment relating to the subject thereof, and which may be supposed to be drawn out in consequence of the relation in which the party making the communications and the attorney stand to each other, are under the seal of confidence, and entitled to protection as privileged communications. *Williams v. Fitch*, 18 N. Y. 547, 551; *Bacon v. Frisbie*, 80 N. Y. 394, 399. The argument is that McCartin & Williams were not at liberty to disclose to the bank what they learned from H. V. Cadwell, under their employment by the Cadwells after the suits were brought, and that, therefore, the bank is not chargeable with notice of what McCartin & Williams so learned. But the principle which protects such communications from disclosure only applies to giving them in evidence without the assent of the person making them. With such assent they may be given in evidence, as well against such person as against a third party. Here, there is no attempt to give in evidence by either McCartin or Williams, as a witness, any communications made to them by H. V. Cadwell. H. V. Cadwell himself has given all the evidence that has been given in regard to any communications by him to McCartin & Williams.

Really, there is no question involved as to any confidential communications by H. V. Caldwell to McCartin & Williams as attorneys for the debtors. The case is one where the attorneys for the creditor, after their employment by the creditor and the bringing of the suits, bound by their obligations to the creditor to secure his money for him by all proper means, entered into the service of the debtors, and by concert with them, and with their full knowledge, caused them to so act, and so acted themselves, in view of information obtained from and on behalf of the creditor from the debtor, who knew that the information was being given and received for the benefit of the creditor, as that the priority in time of the judgments to the bankruptcy proceedings, which was the vital point, was secured. The creditor cannot enjoy the benefit of the priority without taking it *cum onere*, accompanied by responsibility for the knowledge which the attorneys acquired in its service, and which enabled the attorneys to so guide the conduct of the debtors and of themselves as to secure priority.

On the record and by stipulation the defendant appears to have

made sundry objections to testimony in the district court. There was no disposition of them by any order of that court, or by any provision in the decree of that court. The petition of appeal sets forth that the decree below is erroneous because the district court committed errors in its rulings as to the admission of evidence reported by the examiner, and in declining to strike out such as were by defendant objected to, as will more fully appear by the objections to and requests to strike out evidence taken and filed with and before said judge on the hearing of the cause, some of which are referred to in his decision, and also in the rulings and decision of the said judge; that the defendant is chargeable with all the knowledge its attorneys in the prosecution of said several suits to judgment possessed, which was acquired in the progress of the suits, or present to their minds, if acquired previously; and also in holding that said attorneys were under no professional obligation not to disclose the circumstances and designs of the bankrupts, who became clients of theirs after the commencement of said suits, who desired to assist defendant, and that the presumption is they did communicate their information; and also in holding the declarations of the attorneys competent evidence of the intent and knowledge, and to charge defendant. The district judge rendered a decision, on which he said: "The attorneys employed to bring actions and obtain judgments were the bankrupts' attorneys, and the defendant is chargeable with all the knowledge they possessed which was acquired by them in the progress of the suits or present to their minds if acquired previously. Story, Ag. § 40; *The Distilled Spirits*, 11 Wall. 356. They were under no professional obligations not to disclose the circumstances and designs of clients who desired to assist the defendant, and the law presumes that they did communicate their information."

The defendant insists that several objections to evidence should be sustained and the evidence excluded. It was essential to prove the intent on the part of the bankrupts. Their declarations, while this intent was being effectuated, are as competent as their acts. So, also, the declarations of the attorneys, during the progress of the transaction, are evidence of their intent and knowledge. The advice given by the attorneys to their clients is excluded, because inadmissible under the rule which forbids the disclosure of confidential communications. The objections to and requests to strike out evidence referred to in the petition of appeal, as taken and filed with and before the district judge on the hearing of the cause, do not appear in the printed record from the district court, unless the



reference is intended to be to such objections in respect to evidence as are noted in the course of the taking of evidence. But many objections are insisted on by the defendant which do not appear in the record, being taken under a stipulation entered in the record "that all the evidence be taken, reserving the right to object, save as to form of question to any or all of the same, upon the hearing of the cause, with like effect as if the specific objections had been stated and noted by the examiner at the time the evidence was offered." The evidence of H. V. Cadwell, direct and cross, taken in bankruptcy, was admitted by stipulation; the stipulation as to the direct, or that for the plaintiff, being that objections to each and every part of it are reserved "until the hearing of the cause by consent of the respective counsel," and the stipulation as to the cross, or that for the defendant, being that all objections are "reserved until the hearing of the cause, save as to form of question."

I am furnished with a copy of the printed brief presented by the counsel for the defendant to the district court, in which his objections in respect to the evidence are set forth and numbered. Those objections are now insisted on by the defendant. It is not clear how far they can be considered on appeal, there being no disposition made of them by the district court by any order or decree. But the plaintiff's counsel, in his brief in this court, refers to the objections to evidence taken by the defendant as if they were properly before this court, and therefore I proceed to dispose of them by their numbers; and a provision may be inserted in the decree disposing of them. It is not entirely clear what the district court would, in an order, have excluded as being "advice given by the attorneys to their clients." Whatever any such order excluded would not come up for review in an appeal by the defendant. As it is, I shall dispose of the objections on the theory that none of them were allowed by the district court, as there is no order allowing any of them.

(1) Evidence as to the assignment was competent, as part of the history of the case, and throwing light on the intent of the debtors in respect to the judgments of the bank and on the question of the insolvency of the debtors.

(2) Evidence that McCartin & Williams drew the assignment was competent, as showing their knowledge of the insolvency of the debtors.

(3) Evidence that McCartin & Williams appeared for the debtors on the first of May, in the bankruptcy proceedings, was competent, as throwing light on their previous action in thwarting, in co-operation with the debtors, all other creditors but the bank.

(4) For the reasons before given I think the fact that McCartin & Williams, after the suits were brought, advised H. V. Cadwell to answer the

questions of Mr. Crouse and Mr. Brown only in the presence of said attorneys, was competent, H. V. Cadwell assenting to the disclosure, and the fact showing the co-operation of the attorneys representing the bank and of the debtors in securing the preference.

(5) The fact that McCartin & Williams had become attorneys for the debtors at the time of the visits of Mr. Brown and Mr. Crouse was competent, for the reasons before given.

(6) The fact that H. V. Cadwell told Mr. Brown and Mr. Crouse that McCartin & Williams advised him not to talk about his matters with Mr. Brown and Mr. Crouse is competent, for the reasons stated as to objection 4.

(7) Evidence as to the desire of H. V. Cadwell respecting the Van Schaick claim, and as to what Van Schaick told him, was incompetent.

(8) and (9) These objections are well taken.

(10) This objection is well taken.

(11) The evidence as to the inquiries made by Mr. Crouse of H. V. Cadwell and Cadwell's answer, and as to his refusal to make a statement respecting his affairs, was competent, as showing the intent of the debtors.

(12) and (13) The same ruling applies to Cadwell's statement as to whether he had been sued, and to his declining to answer as to his having paid the \$600 note, and to his declining again when Mr. Williams advised him not to answer.

(14) Evidence as to what McCartin said about not allowing any judgments of any amount to be taken against the Cadwells, and as to the conversation with Williams about bankruptcy, and as to what the attorneys said about suits against the Cadwells, was competent, for the reasons before stated. If it was desired to inquire what the attorneys said in denying knowledge of any suits, that could, and should, have been asked on cross-examination.

(15) Mr. Crouse's testimony as to what Cadwell said about being advised by the attorneys to answer only in their presence, was incompetent to prove the fact of such advice being hearsay. The fact that Cadwell declined to answer except in their presence was competent.

(16) and (17) The testimony as to what Williams said at Utica, after the adjudication, about a compromise, was incompetent; and so was the other testimony as to an offer of compromise.

(18) and (19) This testimony ought to be excluded.

(20) and (21) This evidence was competent. The books could have been called for by the defendant, if desired.

(22) This evidence was competent.

(23) Evidence as to what Cadwell saw was competent, for the reasons stated in respect to objection 11.

(24) This evidence was competent, being of the same character as that covered by objection 14.

(25) So much of this evidence as states the understanding of the witness is incompetent. What was said would have been competent. The rest of the answer was unobjectionable.

(26) This evidence, at folio 345, was incompetent. That at folio 306 was competent.

The decree of the district court is affirmed, with costs.

## HUNKER, Assignee, etc., v. BING, Jr.

*(District Court, S. D. New York. September 27, 1881.)***1. BANKRUPTCY—ASSIGNEE IN INSOLVENCY—VOID ASSIGNMENT—ASSIGNEE'S ALLOWANCE FOR DISBURSEMENTS AND SERVICES.**

A voluntary assignee in insolvency, under a void assignment, will not be reimbursed his expenses incurred under the assignment, nor is he entitled to compensation, as assignee, for services. For such services and disbursements, however, as benefit the general body of creditors, either by reason of the preservation of the fund to their use, by advantageous collections of assets, or by conversion of property into money, he will be allowed what is reasonable and just.

**2. SAME—SAME—ATTORNEY'S FEES.**

Payments made by him to an attorney will be governed by the same rule.

In Equity. Exceptions to master's report upon accounting.

*F. W. Hinrichs and G. P. Sheldon*, for complainant.

*Simon H. Stern*, for defendant.

BROWN, D. J. This action was commenced on October 31, 1878, by the complainant, as assignee in bankruptcy of the firm of J. Bear & Sons, to have a voluntary assignment made by that firm to the defendant, as assignee in trust for their creditors, on January 2, 1878, declared fraudulent and void, and the assigned property or its proceeds turned over to the complainant. Upon an answer substantially admitting the plaintiff's claims, with an account annexed, an interlocutory decree was entered on March 15, 1879, adjudging the assignment void as against the plaintiff, and referring it to a special master to pass the defendant's accounts. The master, in his report, dated October 10, 1879, and filed January 3, 1880, allowed to the defendant his charge of \$1,618.14 for his "commissions as assignee," and the sum of \$2,000 paid by him to his attorney for his charges and expenses. To each of these items exceptions have been taken as unwarranted and excessive.

A large part of the property of the bankrupts was sold at auction, under the direction of both the plaintiff and defendant, shortly before the commencement of the action, by order of this court, being all the property then remaining unsold, and the defendant's account accordingly embraces the entire assets of the firm. By this account the gross receipts were \$32,415.02; the charges and expenses, as passed and allowed by the master, amount to \$11,001.95; leaving net proceeds to the amount of \$21,313.07. The charges and expenses, besides the items excepted to, are made up of \$2,650 for rent, about \$2,200 for salaries of persons employed by the respondent, about

\$1,700 paid for duties and freight, \$450 for insurance, and a few hundred dollars for miscellaneous small items of expense.

The respondent's charge of \$1,618.14, for "his commissions as assignee," was intended as a charge of 5 per cent. upon the gross collections; and his counsel, upon the argument, claims that sum as his legal right under a statute of the state of New York, passed May 22, 1878, (chapter 318, § 7,) declaring that assignees "shall receive for their services a commission of 5 per centum on the whole sum which shall have come into their hands." Prior to this act there was no statutory provision in this state fixing the compensation of assignees, but it had long been settled in practice that they were to be allowed the same rates as those prescribed by statute for executors and administrators,—Keiley, *Ins. Assgts.* (3d Ed.) 137; *In re Scott*, 53 How. Pr. 441; *Meacham v. Sternes*, 9 Paige, 398, 403; *Barney v. Griffin*, 2 Comst. 372,—which in this case would amount to less than one-third of the new statutory allowance. The counsel for the complainant contends that the respondent is not entitled to the benefit of this statute, but is limited to the former rule, which was in force on January 2, 1878, when he accepted the trust.

There is nothing in this statute intimating that it was intended to be retroactive. By the ordinary rule of construction it would not, therefore, apply to assignments previously made. The compensation of the assignee, as long fixed by practice, might fairly be deemed to be among the implied terms, both of the making and of the acceptance of the assignment. If the statute in question had materially reduced the compensation of assignees instead of increasing it, it would scarcely be contended that anything less than the clearest indications in the statute would justify its application to assignments already accepted and partly executed. And if a retroactive effect would not be given to such a statute to the prejudice of the assignee, it should not, I think, be applied retroactively to the prejudice of the assignor or of the creditors beneficially interested in the assignment. See MS. memoranda of Choate, J., in *Rutherford v. Clements*, December 29, 1880. I have not been referred to any adjudication on the subject in the state courts, and it is not necessary to determine the question here, as there are other considerations in this case which render this statute, as well as the application of any other fixed rule of compensation, inapplicable.

The assignment has been adjudged fraudulent and void as against the complainant, and its further execution by the defendant lawfully interrupted. The assignee in bankruptcy lawfully takes the estate

into his own hands and is entitled to his legal fees. A duplication of charges, by the payment of full fees to two successive assignees, is not to be tolerated. *In re Kurth*, 17 N. B. R. 573. A voluntary assignee who accepts the trust, knowing from the beginning that it is liable to be set aside as fraudulent and void in bankruptcy, has not, in strictness, any legal claim to compensation. Under some circumstances, accordingly, he has been allowed nothing. *Burkholder v. Stump*, 4 N. B. R. 597; *Clark v. Marks*, 6 Ben. 275; *In re Stubbs*, 4 N. B. R. 376. In other cases he has been considered as simply a creditor of the assignors for his services, and put to his *pro rata* with other creditors. *In re Lains*, 16 N. B. R. 168. In this district the equitable rule has been adopted to allow him reasonable charges for such services and disbursements as have been rendered for the benefit of the general body of creditors by the preservation of the fund to their use, or in the advantageous collection of assets, or conversion of the property into money. *Platt v. Archer*, 13 Blatchf. 351; *Havemeyer v. Loeb*, MS. Dec. 11, 1877.

The cases in which this rule has been applied, however, are the ordinary cases of assignments which are valid under the state laws, and are operative as against all individual creditors so as to preserve the estate intact, and defeat the acquirement of any preference by one creditor over another through judgments and executions, and which are voidable only under the bankrupt act at the election of the assignee in bankruptcy in a direct suit for that purpose. *Wald v. Wehl*, 6 FED. REP. 163, 169. Unfortunately for the general creditors this assignment is not of that character. The state law under which this assignment was made provided that a verified inventory and schedule of the assets and liabilities of the debtor should be filed by the debtor within 20 day after the assignment, and if that were not done that the assignee might, within 10 days thereafter, make and file such inventory and schedule so far as he can, and if not made by either debtor or assignee within 30 days that the assignment shall be void.

The firm of J. Bear & Sons, the assignors, consisted of three co-partners. Immediately upon the execution of the assignment the assignors and other persons about the store, nine in number, were employed by the respondent in preparing the inventory and schedules, which he testifies were prepared under his supervision and the advice of his counsel. Their preparation occupied two weeks, and they were filed on January 16, 1878. On March 11, 1878, a petition of creditors was filed in bankruptcy against the firm; the usual injunction

was issued, which was served on the defendant on March 12th; an adjudication of bankruptcy was entered on May 31, 1878; the assignment to the plaintiff was made on August 9th; and this suit commenced on the thirty-first of October following. In the mean time, during February and March, prior to the filing of the petition in bankruptcy, a judgment was recovered by the Eleventh Ward Bank against the assignors for about \$8,000, upon which execution was issued to the sheriff, and several other judgments were recovered against them, upon which executions were also issued during the same period, all of which, by the law of this state, became liens upon any goods and chattels of the assignors, the legal title to which still remained in them. If the assignment executed on January 2d had been a valid assignment under the state law, these executions would not have attached, and upon the decree in this action setting aside the voluntary assignment, the benefits of the decree, it is settled, would have enured only to the assignee in bankruptcy, and the execution creditors would have remained without lien or preference as before. *In re Biesenthal*, 15 N. B. R. 228. But upon examination of the inventory and schedules by counsel for the judgment creditors, it was found that they were wholly wanting in any statement of the individual assets or liabilities of two of the three partners; that they were verified by only one of them; and that this one had stated nothing in regard to his individual assets or liabilities. Upon the ground of these defects in the schedules, this court, upon the petition of the Eleventh Ward Bank, adjudged the assignment void, under the state law, after the lapse of 30 days, to-wit, on February 1, 1878, and that all the execution creditors, between that date and the eleventh of March, when the petition in bankruptcy was filed, acquired valid legal liens upon the goods and chattels of the assignors. See opinion of Choate, J., *In re Bear*, filed December 23, 1879. These execution creditors have already withdrawn about \$12,500 from the net proceeds of the estate before mentioned, and other similar claims are still undecided; and the numerous petitions and litigations which have thus sprung from the invalidity of the assignment through the defective schedules have entailed large additional expenses, which are likely to leave but a small residue of the net proceeds of \$21,313.07 for distribution among the general creditors.

Upon these facts it is clear that the defendant can have no legal or equitable claim to "commissions as assignee." The assignment became, after the lapse of 30 days, through the remissness of the assignee, not merely voidable, but void, without suit or other direct

proceeding to avoid it. Thereafter, in contemplation of law, there was neither assignment nor assignee; neither trust, trust property, nor trustee. The assigned property reverted by operation of law to the assignors; it became liable to the attachments and executions of creditors, and upon the appointment of the complainant as assignee in bankruptcy it became *ipso facto* vested in him, subject only to such liens as had in the mean time attached upon it. No claim to compensation in the character of "assignee" can therefore be allowed to the defendant; nor for the period of 30 days, during which the assignment was in force, (*In re Croughwell*, 17 N. B. R. 337,) can any claim be entertained for commissions, since the assignment subsequently lapsed and became void through what must be held legally to have been the fault of the assignee himself in not filing "such a schedule as he could."

It does not follow, however, that all remuneration should be denied to the respondent. No claim under the void assignment, or for anything having reference to the void statutory proceeding, can be regarded. But for other acts performed by the respondent, in the way of services and disbursements, which, considered independent of the assignment itself, were lawfully rendered, and were beneficial to the general body of creditors, or which would have been necessarily incurred by the complainant as assignee in the care of the property, or in its conversion into money, allowance should be made. The express assignment affords the defendant no protection. He must bear all the charges and disbursements pertaining to it, or to the defective inventory and schedules contained in his account. But, as it was not illegal for the debtors by parol to put their property into the possession of the respondent as their factor or agent to sell it and distribute its proceeds among their creditors,—though subject to be withdrawn by the debtors at any moment on payment of charges, and subject to the attacks of execution creditors, or to proceedings in bankruptcy,—so the respondent may be regarded as having done what he did under an implied request to that effect, and to have acquired thereby an equitable lien upon the property in his possession for his necessary services and disbursements therein, which should be respected in bankruptcy so far as they have been necessary and beneficial to the general creditors, or such as the assignee in bankruptcy would otherwise have incurred. *Shellington v. Howland*, 53 N. Y. 371; *Madison Ave. Bapt. Ch. v. Bapt. Ch. in Oliver St.* 9 Jones & S. Supr. Ct. Rep. 369, 384; S. C. 73 N. Y. 82, 92; *Platt v. Archer*, *supra*.

From the defendant's account rendered, and from his testimony, it appears that the first two weeks were employed in preparing the inventory and schedules to be filed. As these were useless, and had reference solely to the void statutory proceeding, the expenses so incurred must be disallowed. The salaries of the nine persons thus employed amount to about \$175. From January 16th to March 12th, when the injunction in bankruptcy was served, the respondent was busily employed in selling the goods at wholesale and retail to the amount of \$8,000, and in collecting accounts, and during that time he personally kept the books. During several days before that they had also been employed in preparing a careful inventory and catalogue of all the remaining goods for an auction sale, designed to be held on the fourteenth of March, for which all the preparations were completed, the sale to be made by Bissel & Wells, auctioneers, on a commission of 6 per cent., including guaranty. The proceedings for the auction sale, after being suspended for several months through the injunction in bankruptcy, were finally resumed upon an order of this court, September 20, 1878, directing the sale to be had under the direction of both assignees, and the sale was accordingly completed in October, 1878, and the respondent collected the moneys. Although the reason for this course, or for the long delay in determining upon it, does not fully appear, I infer that it arose from the peculiar nature of the goods,—a large stock of toys,—and that it was found best for the plaintiff to avail himself of the preparations, facilities, and arrangements which the defendant, aided by the debtors, had already made, or could afford, for the most advantageous disposition of such goods. These arrangements and the sale were made, it is true, before the invalidity of the assignment had been pointed out or adjudicated; but it was none the less an adoption and employment of the defendant's services in part, for which he is consequently entitled to compensation down to the close of the sales and commencement of this action on October 31, 1878. *Clark v. Marx*, 6 Ben. 275.

The amount of these auction sales was about \$17,500. For all his services in preparation for and in carrying out these last sales, in connection with the plaintiff, I think the defendant is entitled to one-half the fees of assignees in bankruptcy, to be computed upon that sum; and for his services prior thereto, back to January 16th, when his sales commenced, I think the sum of \$350 a reasonable compensation; but his charges for the nine persons employed two weeks in making the schedules, amounting to \$175, as nearly as I can make out, must be disallowed.



The items charged for payments to the defendant's attorney must abide by the same rule. So far as they depended upon or related to the void assignment, they must be disallowed. So far as they were expenses necessarily incurred for the preservation of the property or collection of the debts, they should be allowed to an amount which is reasonable and just.

The charges as presented cannot, therefore, be allowed. They are in two items—one, "January 17, 1878, \$1,000;" and one, "March 11, \$1,000." Both the items paid were evidently paid upon the basis of an assignment assumed to be valid under the state law and voidable only in bankruptcy. The first was paid but 15 days after the assignment was made, immediately after the defective schedules were filed, and would seem to have been paid quite as much as a retainer for future services under the assignment, as for any services already rendered, as the attorney values his services in connection with the schedules at \$150 only. The second item was paid on the day the petition in bankruptcy was filed, of which it is shown that the respondent had knowledge at the time. No bill of itemized charges was rendered by the attorney, and none was exhibited before the master. The attorney testified to numerous matters upon which he was consulted, and described what he did, in general terms, without any specification of the value of his different services; and the master has allowed the charges in gross. The adjudication that the assignment was void under the state law was not made until some two months after the date of the master's report; and this adjudication makes it impossible to take into consideration quite a number of the matters specified by the attorney in his testimony as proper subjects of charge as against the plaintiff, which might possibly have been otherwise allowed.

Disallowing, therefore, all charges solely depending upon or referring to the void assignment or its execution under the state law, and all advice for the defendant's individual benefit, and admitting those charges only which pertain to the preservation or collection of the assets and to the benefit of the general creditors, the following subjects of claim specified in the testimony should be excluded, viz.: Counsel's examination of the assignment, and advice in relation to the acceptance of it, and instructions as to the defendant's duties and responsibilities under it; preparing and filing schedules and advice concerning the same; "matters connected with the estate" not otherwise defined; advertising for claims and order of state court therefor; order to supplement schedules; "assisting" in the appoint-

ment of receiver in the Schroeder foreclosure, that not being to the benefit of the creditors, but opposed thereto; preparing and filing defendant's bond as assignee; advice as to the effect of the injunction in bankruptcy, and services in this suit. These subjects form by far the greater part of all those specified by the attorney. The remaining items embrace several collection suits, advice concerning disputed claims, and negotiations and arrangements concerning litigations which were of a professional character and beneficial to the creditors. The evidence is not sufficiently explicit to enable me to estimate with exactness the value of the services last referred to; but having examined carefully all the testimony in regard to them, and allowing a liberal sum for each, I find the aggregate will not exceed the sum of \$500, to which amount the complainant's counsel claims that these charges should be reduced, and that sum is accordingly allowed.

The master's report passes the account as of December 27, 1878. By the testimony it appears that the balance of \$20,663.07, then in the respondent's hands, had been paid over to the complainant prior to the report. A final decree should be prepared in accordance with this decision, which may be settled on two days' notice before me, if the parties do not agree.

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### KELLS *v.* McKENZIE and others.

(Circuit Court, E. D. Michigan. November 7, 1881.)

#### 1. LETTERS PATENT—SCOPE OF REISSUES.

A reissued patent is not valid for everything which might have been claimed in the original patent, nor does its validity depend wholly upon the fact that the new features attempted to be secured thereby were suggested in the models, drawings, or specifications of the original patent.

Hence, where a patentee, in his specifications, claims as his invention a particular part of a machine, and his claims are all limited to that part, a reissue embracing other and distinct portions of the machine is not for the same invention, and is *pro tanto* void, although the designs accompanying the original patent show all the features contained in the reissue.

#### 2. BRICK MACHINE—REISSUE—INVALIDITY.

The first four claims of reissued patent No. 8,867, to Philip H. Kells, for an improvement in brick machines, are void for the reason that they enlarge the scope of the original patent.

#### 3. SAME—SAME—ANTICIPATION.

Reissued patent No. 8,127, to Philip H. Kells, for an improvement in brick machines, is also void, because a machine embodying the invention therein claimed was "on sale" more than two years before the application for the original patent was filed.

In Equity.

This was a suit upon reissued letters patent Nos. 8,867 and 8,127, for improvements in brick machines. Of reissue No. 8,867 defendants were charged with having infringed the following claims:

(1) A horizontal brick or tile machine, constructed with a tub supported at its ends in the standards; and with a nose-piece or die-holder on the front extension. (2) The combination of the front standard, supporting the extremity of the tub, a nose-piece attached directly to said standard, and a die secured to the nose-piece; all substantially as herein described.

Of reissue No. 8,127 they were charged with having infringed seven claims, not necessary to be here set forth.

*Thomas S. Sprague*, for complainant.

*George H. Lothrop*, for defendants.

BROWN, D. J. The machine described in complainant's model and specifications consists of a horizontal tub of iron, supported by two standards, one at the front and one at the rear end, bolted together so as to prevent the pressure of the clay from forcing them apart. Upon the rear end of the tub is a hopper for receiving clay, and through its center is a shaft armed with blades set in a spiral position, the revolution of which not only puddles the clay but forces it forward through the tub and through a nose-piece, at the end of which are inserted dies for the moulding of the clay in proper shape as it passes out of the machine. Behind the rear standard are two cog-wheels used for turning the shaft.

The first objection taken to reissue No. 8,867 is that it is not for the same invention as that covered by the original patent, and is therefore void. To determine this question it is necessary to consider with some care what the powers of the commissioner are with respect to reissuing patents, and to draw the line (often a very difficult task) between that which is and that which is not the same invention. By the fifty-third section of the act of 1870 (Rev. St. § 4916)—

"Whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, or in accordance with the corrected specifications, to be issued to the patentee, etc. \* \* \* But no new matter shall be introduced into the specification, nor in case of a machine patent shall the model or drawings be amended, except each by the other; but when there is neither model nor drawing, amendments may be made upon proof satisfactory to the commissioner that such new matter or amendment was a part of the original invention, and was omitted from the specification by inadvertence, accident, of mistake, as aforesaid."

Under this section it is now settled that the decision of the commissioner reissuing the patent is final and conclusive, and is not subject to review in any court, except as to the identity of the invention. But if it be apparent upon the face of the patent that he has exceeded his authority and has thus acted without jurisdiction, and that there is a manifest repugnancy between the old and new patent, then it must be held as a matter of legal construction that the new patent is not for the same invention as that embraced and secured in the original patent. Under the language of the statute the commissioner can only authorize a reissue when the patent is inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new. But in *Seymour v. Osborne*, 11 Wall. 544, it was said by Mr. Justice Clifford, in delivering the opinion, that—

“He may, doubtless, under that authority, allow the patentee to redescribe his invention, and to include in the description and claims of the patent not only what was well described before, but whatever else was suggested or substantially indicated in the specification or drawings, which properly belong to the invention as actually made and perfected.”

This case and that of *Battin v. Taggart*, 17 How. 74, have very generally been accepted by patentees as authority for the proposition that a patent might be reissued so as to cover everything suggested in the drawings in the original patent, although the claims and the introductory statement of the invention may have had reference solely to another portion of the machine, and other persons might be thus led to suppose that the patentees regarded nothing else as his invention or consented to abandon his right to the remainder to the public.

The cases in the supreme court are not easily reconcilable, more probably from the difficulty of understanding the exact question decided, in the absence of drawings and models, than from any change of view as to the law, and the cases in the circuit courts are in hopeless confusion. The tendency of later cases in the supreme court, however, has been to hold the patentees to a much more rigid rule than that indicated in *Seymour v. Osborne*, and the court has frequently expressed its disapproval of the practice which has grown up of claiming everything which might have been claimed in the original patent, to the detriment of those who may have acted upon the supposition that such claims had been abandoned to the public. Thus, in *Russell v. Dodge*, 93 U. S. 460, the original patent was for a pro-

cess of treating bark-tanned lamb and sheep skin by means of a compound in which heated fat liquor was an essential ingredient. This patent was surrendered and reissued for the use of fat liquor in any condition, hot or cold, in the treatment of leather, and for the process of treating bark-tanned lamb or sheep skin by means of a compound in which fat liquor was the principal ingredient. The state of the liquor was not mentioned as essential to the treatment or accomplishment of any of the results sought. It was only stated as a thing to be desired that the liquor should be heated, and that it would be preferable that other ingredients were mixed with the heated liquor to make the compound mentioned. The court held the reissue void, upon the ground that the use of the liquor hot or cold was an expansion of the original patent, which required it to be hot. And this, although the patentee was the first to discover that fat liquor, in any condition, could be used for the purpose specified. It was said—

“That as a reissue could only be granted for the same invention embraced by the original patent, the specification could not be substantially changed, either by the addition of new matter or the omission of important particulars, so as to enlarge the scope of the invention as originally claimed. The original patent was not inoperative nor invalid from any defective or insufficient specification. The description given of the process claimed was, as stated by the patentee, full, clear, and exact, and the claim covered the specification; the one corresponded with the other. The change made in the old specification, by eliminating the necessity of using the fat liquor in a heated condition, and making in the new specification its use in that condition a mere matter of convenience, and the insertion of an independent claim for the use of fat liquor in the treatment of leather generally, operated to enlarge the character and scope of the invention.”

So, in *Powder Company v. Powder Works*, 98 U. S. 126, it was held that letters granted for a certain process of exploding nitro-glycerine would not support reissued letters for a composition of nitro-glycerine and gunpowder and other substances, even though the original application claimed the invention of the process and the compound. In this case Mr. Justice Bradley says:

“The specification may be amended so as to make it more clear and distinct, the claim may be modified so as to make it more conformable to the exact rights of the patentee, but the invention must be the same. So particular is the law on this subject that it is declared that no new matter shall be introduced into the specification. This prohibition is general, relating to all patents, and by ‘new matter’ we suppose to be meant new substantive matter, such as would have the effect of changing the invention, or of introducing what might be the subject of another application for a patent. The danger to be provided against was the temptation to amend the patent so as to cover im-

provements which might have come into use, or might have been invented by others after its issue. The legislature was willing to concede to the patentee the right to amend his specification so as fully to describe and claim the very invention attempted to be secured by his original patent, and which was not fully secured thereby in consequence of inadvertence, accident, or mistake, but was not willing to give him the right to patch up his patent by the addition of other inventions, which, *though they might be his, had not been applied for by him, or, if applied for, had been abandoned or waived.* For such inventions he is required to make a new application, subject to such rights as the public and other inventors may have acquired in the mean time."

A case bearing more directly upon the one under consideration than any other one I have met is that of the *Manuf'g Co. v. Ladd*, 102 U. S. 408, and, as it contains the latest expression of the supreme court upon this subject, it is entitled to great weight. The original patent was for a water-wheel of specific construction and form, with an annular chamber, a peculiar gate and guide arrangement, and a contrivance for adjusting the wheel on the step. There were three claims to the patent. After a lapse of twelve years and a half the patentee obtained a reissue with eleven different claims of a sweeping character, which, taken literally, would have given him a monopoly of all water-wheels having simultaneously an effective inward and downward flow and discharge, whatever might be the shape of the floats or of the crown. The court considered itself bound to consider the claims of the reissued patent in accordance with the limitations of the invention in the original patent, and held the excess to be void. In delivering the opinion Mr. Justice Bradley spoke very forcibly of the evils arising from expanding claims in reissued letters patent, and in commenting upon the statute observed:

"It was never intended to allow a patent to be enlarged, but to allow the correction of mistakes inadvertently committed, and the restriction of claims which had been improperly made, or which had been made too broad,—just the contrary of that which has come to be the practice. In a clear case of mistake, (not error in judgment,) the patent may undoubtedly be enlarged; but that should be the exception and not the rule, whereas the enlargement of claims has become the rule, and their contraction the exception."

And in speaking of the reissue in that case he says:

"The invention of a wheel was not claimed at all. A wheel was described, but it was a wheel made after a particular pattern or form, and adjusted to a particular apparatus for the reception and discharge of the water. \* \* \* Instead of correcting inadvertent mistakes in the specifications, which rendered the patent inoperative and void, the patented descriptions are evidently intended to widen the scope of the patent, and make it embrace more than it did at first. The mistake of the patentee, or his assigns, seems to have been

in supposing that he was entitled to have inserted in a reissue patent all that he might have applied for and had inserted in the original patent. \* \* \* A reissue can only be granted for the same invention which was originally patented. If it were otherwise, a door would be opened to the admission of the greatest frauds. Claims and pretensions, shown to be unfounded at the time, might, after the lapse of a few years, a change of the officers in the patent office, the death of witnesses, and the dispersion of documents, be set up anew, and a reversal of the first decision obtained without appeal, and without any knowledge of the previous investigations upon the subject. \* \* \* Hence, there is no safe or just rule but that which confines a reissued patent to the same invention \* \* \* which was described or indicated in the original."

Bearing in mind now that the reissue must be for the same invention as the original patent, and that the fact that the patentee might have applied for and had inserted in his original patent all that he now claims is so conclusive evidence that his reissue is valid, let us examine the reissue under consideration in the light of these authorities. Is it for the same invention as the original? In the original patent, No. 124,590, the patentee specifies his invention in the following precise and unequivocal language:

"The invention consists (1) in a peculiarly-shaped double throat-piece; (2) in a mode of attaching and supporting removable dies; (3) in giving the dies convex sides, so as to secure the filling of corners and produce concave or recessed bricks; (4) in a yielding box, to receive the proper length of clay for one or more sets of bricks, and to hold the same while the bricks are being severed; (5) in a sliding cut-off adapted to sever the bricks at each end; (6) in a combination of cam, forked lever, and connecting rod for operating the cut-off; (7) in driving the cut-off from the tub-shaft; (8) in an expelling screw cast with a shaft-socket and feather."

It will thus be seen that this statement of his invention, as well as the eight claims made in the original patent, relate solely to that portion of the machine in front of the forward standard, at the point where the clay passes beyond the action of the screw and is moulded to pass through the dies. There is no intimation that he claims any novelty in the general construction of the machine, or of its tub or standards, or of any combination by which the tub is attached to the standards, or the standards are held in place and prevented from spreading; although it is true that the drawings annexed to his patent show a machine completed in all these particulars. This patent was issued March 12, 1872. The defendants began building machines similar in their general construction to complainant's machine, but avoiding the use of that portion of the machine covered by complainant's patent, in the fall of 1877. In July, 1879, complainant

applied for a reissue, in which he states his invention as before, but enlarges very greatly its scope:

"The subject of my invention is a horizontal brick machine, constructed with a tub supported at its ends in suitable standards, and with a nose-piece or die-holder projecting forward from one of the standards, and adapted for the attachment of suitable dies, which are formed to deliver the clay in one or more horizontal columns on the edge instead of flatwise, as heretofore; the advantages of running the clay on edge being that they are less liable to distortion, and in better shape for cutting into bricks. My invention further consists of a brick machine having a horizontal shaft provided with a collar in rear of one of its bearings to confine the shaft against forward movement when the machine is running empty."

Four additional claims are made, none of which have any relation to the claims made in the original patent. Now, if it be true that the patentee may claim in his reissue anything which was suggested in the drawings of the original patent, this reissue is valid; but if he is confined to what he declares is his invention in his original patent, then it is invalid. There is nothing here tending to show that his original patent was inoperative or invalid by reason of a defective or insufficient specification. On the contrary, his specifications are full and complete, and his claims appear to cover everything which he set forth as his own invention. There is no attempt to amend the claims contained in the first patent. There is not even an attempt to enlarge the scope of these claims, but there are four new and distinct claims made to parts of the machine, to which no reference is made in the original patent as his invention. Indeed, a comparison of the two specifications precludes the idea of inadvertence, accident, or mistake, since all but two of the claims of the original patent are reproduced in the reissue; and there is no pretence that this patent was inoperative or invalid as to anything therein claimed to be the patentee's invention. It appears to be a case where the patentee has materially enlarged the scope of his patent for the purpose of reaching those who are constructing machines after the same general design as his own. Upon the best consideration I have been able to give to this matter, I have come to the conclusion that this reissue cannot be supported, and that as to these four claims it is void.

Proceeding now to the second patent in this suit, reissue No. 8,127, dated March 19, 1878, the original of which was issued May 23, 1876, an objection is taken to the first claim upon the ground that this claim was made in the original patent and rejected; that the patentee acquiesced in this rejection, and therefore cannot make the same



claim in the reissued patent. It is true that in the case of *Leggett v. Avery*, 101 U. S. 256, it is said by Mr. Justice Bradley that it is very doubtful whether, where an applicant for letters patent, in order to obtain the issue thereof, acquiesces in the rejection of a claim thereto, a reissue containing such claim would be valid. In that case, however, on the surrender of the original letters there was a disclaimer of a part of the invention described by them, filed by the patentee in the patent office, and reissued letters were granted for the remainder. Afterwards, in the second reissue, the disclaimed inventions were embraced, and it was held that the patentee could not sustain a bill to restrain the infringement of them. The decision upon this point is not easily reconcilable with that of *Smith v. Good-year Dental Vulcanite Co.* 93 U. S. 486, 500, and with the other cases there cited, and, upon the whole, I should not feel inclined, without a more definite ruling upon this point, to hold this claim bad upon that account. It would seem that as the reissue in this case was applied for within two years after the original patent was issued, that this might be considered as rather in the nature of a renewal of his application for the allowance of this claim and for a rehearing of the matter. I do not deem it necessary, however, to express a decided opinion upon this point.

Another objection is taken, which goes to show the foundation of the whole patent. Revised Statutes, § 4886, provides "that any person who has invented or discovered any new or useful art \* \* \* not in public use or on sale for more than two years prior to his application \* \* \* may \* \* \* obtain a patent therefor." There is evidence in this case tending very strongly to show that in August, 1873, a machine, which embodied all the essential features of this patent, was offered for sale by the patentee to Jamison & Afflick, brickmakers, at Chesterton, Indiana. A prior machine, embodying all the material combinations claimed in this patent, was completed by the complainant in 1868, and was tried. Complainant says that this experiment demonstrated the fact, that, if the machine were constructed of sufficient strength, it would be a valuable operating machine. It was laid aside for the present, however, and stood in a shed at Angell's foundry in Adrian during the winter of 1868 and 1869, when it was taken to pieces, and a portion of it saved and put into another machine, which was built in 1872 at Farrar & Dodge's. This machine appears to have had all the material elements of the machine shown and claimed in this patent. In August, 1873, it was sent to Jamison & Afflick, brickmakers, at Chesterton;

and the important question arises whether it was sent there for trial only, or for trial and sale. Afflick, one of the firm, testified that it was shipped to them on terms, as they understood, that they were to buy it if the machine worked satisfactorily; if not, complainant was to pay his own expenses and take the machine back. They kept it, apparently, two or three weeks, and while there it was used experimentally, to see whether it would work or not. It seems that complainant went there for the purpose of testing it, to see if it would run; but it was finally shipped back to Adrian, not being satisfactory to the firm. It is stipulated that Jamison, the other member of the firm, would testify substantially as Afflick did upon this point. The only other direct testimony is that of the complainant himself, who says he sent it there for an experimental machine, to see whether he could get it to do good work. His testimony upon this point is substantially as follows:

*"Question.* Did you not send it away on trial, to be sold or to be bought by Jamison & Afflick if they liked it? *Answer.* Not until after it was tested. *Q.* Didn't you send it there on trial, to be bought by Jamison & Afflick if they liked it? *A.* I did not. *Q.* How did you come to send it up to them? *A.* He came down to see me for repairs on his wheel machine, and we got to talking about machines, and I told him: 'Jamison, if you are a mind to, I will send you that machine awhile to try it, and if it works all right it will be all right.' *Q.* What do you mean by being 'all right;' that the machine would be all right? *A.* So it would work all right. *Q.* How do you mean, work all right? What would be all right? *A.* What would be all right? *Q.* Yes, sir. *A.* It would be all right provided they wanted it. We didn't know whether he wanted it or not. He didn't say whether he wanted it or not. *Q.* If it worked all right were they to take it? *A.* They didn't say they would take it. *Q.* They could take it? *A.* They could if they wanted to. *Q.* Didn't you try to sell it to them? *A.* No, sir; I didn't try to sell it to them. I first wanted to get the machine so I could do something with it, and until I knew it was so I could put it out."

This testimony is, evidently, very evasive, but it leaves a strong impression upon my mind that in reality the machine was sent to Chesterton for sale if satisfactory. There is no reason shown why complainant sent it to a distant place simply for trial, particularly as it appears that he tried the same machine at Condit's yard, in Adrian, before sending it to Chesterton. This trial seems to have proved a failure, and the machine was afterwards put in better condition, and might as well been tried in Adrian again, if all that complainant desired was to experiment with it. I think this is the only direct testimony upon the point. The witness Galloway testifies that he heard the matter talked over between complainant and the one

who was to buy the machine, and that it was shipped to be sold if it suited; that it was afterwards shipped and returned to Adrian. There is also evidence tending to show that complainant, in 1872, endeavored to sell this same machine to one Wiggins, and although this is denied, the matter of the sale of the machine when perfected seems to have been made the subject of a conversation between complainant and him. The machinery was afterwards rebuilt and sold a short time within the two years before application was made. On the whole, the evidence, I think, establishes the fact that this machine was on sale more than two years before application was made for the patent.

The question whether the offer to sell a single machine would be sufficient to avoid the patent was not discussed, and I express no opinion upon the point.

It results that the bill must be dismissed.

Since this opinion was written my attention has been called to an interesting article upon reissued patents, in the November number of the *American Law Review*, vol. 15, p. 731, in which the learned writer draws the same inferences which I have from the recent adjudications of the supreme court.

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### DETROIT LUBRICATOR MANUF'G CO. v. RENCHARD and others.

(*Circuit Court, E. D. Michigan.* August 15, 1881.)

#### 1. LETTERS PATENT—IMPROVED LUBRICATORS—ANTICIPATION.

A mere drawing, not followed by construction and actual use of the machine, does not amount to anticipation. *Held, therefore*, that the letters patent granted May 22, 1877, to Charles H. Parshall, for an improvement in lubricators, is not anticipated by the drawing of J. V. Rerchard, which bears date August 10, 1876.

#### 2. SAME—SAME.

A lubricator, with metal oil cup, glass indicator, and a tube shaped like an inverted syphon, whereby the condensed water can drop into the oil cup through the indicator, not admitting of the passage of the oil into the condenser, but forcing it into the engine it is needed to lubricate, which is effected by an arrangement of the parts by which the condenser and the oil cup are brought into immediate contact, so that the water-seal tube may conduct the condensed water into the body of the oil, and thence upward again so as to discharge directly into the indicator, while it may not effect any new result, does attain the same result in a better mode than was known before. and is therefore a valid subject for a patent.

In Equity.

MATTHEWS, Justice. This was a bill in equity, filed May 4, 1881, by the complainants, as assignees of Charles H. Parshall, of a patent granted to him May 22, 1877, for an improvement in lubricators, alleging an infringement by the defendants and praying for an injunction and an account. The defendants, by their answer, deny the alleged infringement, and claim the right to manufacture, use, and sell lubricators, such as it is shown in the proof they are engaged in making, by virtue of a patent to the defendants, J. Vincent Renchard and John J. Renchard, No. 184,426, granted November 14, 1876, and insist that they, and not Parshall, are the true, first, and original inventors of the device now claimed by the complainant; and that the said Parshall surreptitiously and unjustly obtained the letters patent issued to him. It is also averred, by way of defence, that the improvements claimed in the Parshall patent, No. 191,171, are shown and described in certain earlier patents, viz.: No. 169,124, granted to W. P. Stevenson, October 26, 1875, and No. 187,964, granted to W. A. Clark, March 6, 1877. It is also alleged, as a defence, that the Parshall patent is void because the production of the device therein shown did not involve the exercise of invention or discovery, but only mechanical skill.

The inventions claimed as covered by the Parshall patent relate to certain improvements in lubricators for steam-engines, according to which they are of a construction peculiarly fitted to be readily and neatly applied to any form of engine, and also compacting the several parts into a close and simple body form. The supporting stem is provided with independent steam and oil ducts directly connecting the main steam-pipe of an engine with the respective water-condensing and oil-feeding chamber of the lubricator. A water-pipe connects the condenser with a glass indicating tube, located on the side of the lubricator opposite to that of the supporting stem, and is of such a construction as to both warm the oil in the body of the cup and at the same time act as an effective seal, guarding against the inflow of oil into the condenser. The indicator has free connection at both top and bottom extremities with the interior of the oil cup, while the upper extremity connection is free, and opens jointly into the oil cup and the water-pipe leading from the condenser, thus permitting the water and oil to pass respectively between the indicator and the water-pipe on the one hand, and the indicator and the oil cup on the other hand. The oil cup is made of metal, and is provided with a check-valve, through which drop by drop the oil is forced into and through the duct leading into the steam-pipe, as drop by

drop it is displaced by water from the condensing chamber passing through the water-pipe in a siphon-shaped tube, and dropping from its lower orifice into the glass indicator, which thus at all times shows the continuous operation of the lubricator, until the supply of oil in the oil chamber is exhausted. The steam from the steam-pipe passes by a separate duct into the condensing chamber, and is prevented by the check-valve in the oil duct from passing through it into the oil cup. The controversy in the present suit arises upon the sixth claim of the patent, which is in these words:

"(6) The combination with the oil chamber and condensing chambers, directly secured to each other, of a water seal pipe, the upper end of which connects with the condensing chamber, while the lower portion of the pipe depends into the oil chamber, and the lower end connects directly with a glass indicator, the ends of which have free communication with the oil chamber, substantially as and for the purpose set forth."

As there is free communication between the oil cup and the glass indicator, the oil and the water stand related as to level in the latter precisely as they do from time to time in the former, and the drops of water, as condensed, fall into the oil cup, displacing the oil, only through the glass indicator. It will be observed that the combination set forth in this claim contemplates the oil and condensing chambers as "directly secured to each other." The two chambers are in juxtaposition, the condensing chamber being immediately over the oil cup, the bottom of the former being in a single piece with the body of the condenser, and forming the top of the oil cup, being a diaphragm, the supporting stem which connects the lubricator with the steam-pipe being fitted above this diaphragm to the condenser and not intervening between the two chambers. This feature in the arrangement of the parts of the device is material, considering the state of the art at the date of the patent, and limits the claim of the patent in the sixth claim to its precise terms.

Prior to the issue of the Parshall patent, viz., November 14, 1876, there was granted to two of the defendants, John J. Renchard and J. Vincent Renchard, a patent, No. 184,426, for an improved lubricator, under which the defendants claim the right to manufacture the lubricators alleged by the complainant to be an infringement of the Parshall patent. In that patent, however, the condensing chamber and the oil cup are not directly secured to each other. The apparatus is attached to the steam-pipe of an engine by means of a horizontal trunk. On top of this a condensing chamber is secured, and from the outer end of the lower part the oil cup is suspended. Communi-

cation between the two is had by an angular passage, into an enlarged continuation of which is tapped the upper and longer leg of an inverted siphon tube, whose short leg terminates near the top of the cup and close to the sides thereof usually observed. The cup itself is a glass cylinder, and has no external indicator. One of the claims of the patent (the third) is: "In a displacement lubricator, substantially as described, the combination, with the elevated water reservoir and suspended oil cup, of the inverted siphon tube, through which the water passes into the said oil cup, substantially as described and shown." There is no separate claim in this patent for the inverted siphon tube. The advantage of having the tube in the form of an inverted siphon is thus set forth in the specifications of this Renchard patent: "If the tube were straight, the water in its descent would press up the oil, which is of less specific gravity, and the water and the oil would thus gradually change places; but by making it in the shape of an inverted siphon, and being always full of water, the oil cannot force its way down through the short leg, and hence takes another outlet." In other words, it effectually prevents the escape of oil by ascent through the tube into the condensing chamber, and forces it through the duct prepared for it into the steam-pipe or machine to be lubricated.

As early as January 2, 1872, a patent for an improvement in lubricators, No. 122,361, was granted to William A. Clark, Westville, Connecticut, which consisted of a metallic condensing chamber, superimposed upon a glass oil cup, connected by means of a straight tube, depending perpendicularly, to convey the water into the oil cup to a point very near its bottom, below the water level. Between the two chambers was the arm or trunk, by which the lubricator was attached to the steam-pipe, and by means of a single passage through which steam was admitted to the condenser, and the oil, forced upward from the oil cup, flowed into the steam-pipe. Subsequently, March 6, 1877, but still prior to the date of the Parshall or complainant's patent, there was issued to Clark an additional patent, No. 187,964, for an improvement in lubricators. In this he substituted for the glass oil cup one made of metal, with a glass indicator, external to it, but freely communicating with it at both extremities. The water tube, which in his previous instrument passes vertically and directly from the condenser to oil cup, was now made to pass by a right angle horizontally through the intervening trunk towards the gauged tube or indicator, where it terminated by opening upwards into a small chamber, in which was sealed a light check-valve. From this cham-

ber a passage extending downward into a glass indicator delivered the drops of condensed water against the side of the glass indicator, constituting a visible feed. The use of the metallic oil cup instead of one made of glass became necessary, particularly upon locomotives, as experience had shown that glass is liable to be broken by the motion of the machinery; but that rendered equally necessary the use of the glass indicator, so that it might be open to observation what was the condition of the lubricator. This undoubtedly led to the improvement patented by Clark, March 6, 1877, and to that of Parshall, May 22, 1877. Comparing their patents with one another, remembering that they are each for a particular and specifically described combination of several parts, no one of which is separately claimed as new, I cannot say that they are identical, or that either of the prior ones covers that claim in controversy in this suit, as set forth in that of the complainant.

It is further insisted by the defendants, however, that if not covered by the patent of November 14, 1876, nevertheless the combination now claimed by the complainant was their own invention, and prior to that of Parshall, and that, in truth, Parshall acquired the knowledge of it from them surreptitiously, and so obtained his patent in fraud of their rights. The evidence, in my opinion, does not sustain the charge that Parshall obtained his knowledge of the device he claims to have patented from the defendants, and the assumption that both were original and independent inventors of it seems to me best supported by the proof. The defendants exhibit a drawing made by J. V. Renchard which bears date August 10, 1876, and which, it is testified by him, was made on that day, and by others, that he showed it to them about that time. This antedates Parshall's application, but it fails to supersede his patent for the reason that it seems well-established in evidence that Renchard did not at that time prosecute the matter beyond the mere drawing. The drawing seems to exhibit a perfect machine in all its parts, and sufficiently to show the combination forming the subject of the present controversy, particularly the metallic oil cup, the siphon tube carrying the condensed water into the glass indicator, and the two chambers, condensing and oil, closely and directly united. Nevertheless, it is clearly proven that the defendants did not, in fact, construct an indicator in this form, and reduce it to actual use, until after it had been successfully accomplished by Parshall, nor until after the date of his patent. This mere drawing, therefore, cannot be allowed to have the effect of depriving Parshall of his title of being the first and original inventor.

It is insisted, however, on the part of the defendant, that the Parshall patent is void, so far as the sixth claim now under consideration is involved, on the ground that the combination covered thereby is a combination of parts already well known, producing no new result, and requiring no invention, but only mechanical skill, in its adaptation, and therefore not patentable; and to support this proposition counsel cite and urge the rule as laid down in the supreme court in the case of *Heber v. Van Normer*, 20 Wall. 368, in the words:

"It must be conceded that a new combination, if it produces new and useful results, is patentable, although all the constituents of the combination were well known and in common use before the combination was made; but the result must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Thereby bringing old devices into juxtaposition and there allowing each to work out its own effect without the production of something novel, is not invention. No one, by bringing together several old devices without producing a new and useful result, the joint product of the elements of the combination and something more than an aggregate of old results, can acquire a right to prevent others from using the same devices, either singly or in other combinations; or, even if a new and useful result is obtained, can prevent others from using some of the devices, omitting others, in the combination."

It is not always easy, in one's own mind, to draw distinctly the line which, in the application of a general rule like this, no matter how clearly its meaning may be apprehended, separates what is here called the exercise of that invention entitled to the protection of a patent, and exercise of mere mechanical skill in readaptations, which are not. Still more difficult is it, in the application of the rule to the circumstances of a particular case, to point out and state distinctly to others, so as to clearly convey one's meaning, the reasons which determine the conclusion reached, without, at least, reference to drawings and diagrams, and minute and detailed rehearsals, of the various parts of the machine or device, their relation to each other, their mode of operation, and comparison with others, which would show the exact state of the art at a particular date. That difficulty is encountered to some extent in the present instance; so far, at least, as the attempt should be made to enumerate any new results attained by the combination and covered by the sixth claim of the Parshall patent, other than those which are separate but aggregated results of the several well-known parts or elements that constitute the combination. But what is presented by the combination, as it seems to me, is this: A lubricator, in which the breakage



of glass oil cups is avoided by the substitution of metal, while the important feature of the visible feed is retained, by means of a glass indicator and the dropping of the condensed water into the oil cup through the indicator, by the means of a tube shaped like an inverted syphon, whereby the passage of the oil into the condenser is made impracticable, thus forcing it into the engine it is needed to lubricate. And this is effected by an arrangement of the parts by which the condenser and the oil cup are brought into immediate contact, so that the water seal tube may conduct the condensed water into the body of the oil, and thence upwards again, so as to discharge directly into the indicator. If there be no new result here, at least I am constrained to say that I feel bound to accept the decision of the experts of the patent-office, as certified in their recommending the Parshall combination for a patent, and of the office itself in granting it, as evidence, not otherwise overthrown, that the result is attained in a better mode than was before known. This evidence is corroborated by the actions of the defendants themselves, who, abandoning their lubricator, made before that in accordance with the specifications of their own patent, after the issue of the patent to Parshall, adopted in lieu of it the combination secured by it to him.

I find, accordingly, that the complainant is entitled to a decree as prayed for. Decreed accordingly.

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TUCKER v. SARGENT & Co.

(Circuit Court, D. Connecticut. September 2, 1881.)

1. LETTERS PATENT—TUCKER BRONZE.

Tucker bronze is made by cleaning a piece of cast-iron, of the desired pattern, from the sand and scale which adheres to it when it comes from the mould, then coating it with a very thin film of oil, and, finally, subjecting it to a high degree of heat one or more times, whereby various colors may be produced upon the surface of the iron and rendered permanent. *Held*, that bright cast iron oxidized, and covered with a coat of oxidized oil, varnish, or size, may be, but is not necessarily, Tucker bronze; and that, in the present case, there is no infringement.

*Elihu G. Loomis and James E. Maynadier*, for plaintiff.

*Charles E. Mitchell and John S. Beach*, for defendant.

SHIPMAN, D. J. This is a bill in equity based upon the alleged infringement of reissued letters patent Nos. 2,355 and 2,356, dated September 11, 1866, and granted to the Tucker Manufacturing Company as assignee of Hiram Tucker, and now owned by the plaintiff,

—one patent being for an improved process in bronzing or coloring iron, and the other being for the iron thus bronzed. The original patent was issued December 15, 1863.

These reissued patents were the subject of litigation before Mr. Justice Clifford in *Tucker v. Tucker Manuf'g Co.* 10 O. G. 464; and before Judge Lowell in *Tucker v. Burditt*, 5 FED. REP. 808; and in *Tucker v. Dana*, 7 FED. REP. 213. They have heretofore, to a certain extent, been the subject of discussion in this court. Judge Lowell, in *Tucker v. Burditt*, describes the patented process, and construes the patent as follows:

“The process consists of cleaning a piece of cast iron of the desired pattern from the sand and scale which adhere to it when it comes from the mould, and then coating it with a very thin film of oil, and subjecting it to a high degree of heat, one or more times, whereby various colors may be produced upon the surface of the iron, and rendered permanent, which, before this invention, were not produced in cast iron, or, if approximated, were not permanent. A film of varnish containing oil may be used instead of oil, and may infringe the patent; and so, if the iron is first heated, and then varnished and heated again, the process may be infringed.”

With this general definition of the patented process the parties do not now find fault.

The patentee describes the process more at length in the specification of reissue No. 2,355, and says:

“Metals have heretofore been lacquered or bronzed by the application of a solution of resin and metallic powders or salts, and dried by exposure to air or heat. Iron has been japanned by covering its surface with oily solutions of asphaltum and pigments, and subsequent application of heat sufficient to produce hardness. These are well-known operations. My invention consists in a process of covering iron with a very thin coating of oil, and then subjecting it to heat, the effect of which is to leave upon the iron a firm film, which is very durable, and gives the iron a highly ornamental appearance, like that of bronze. In practice I proceed as follows: The surface of the iron is cleansed from sand, scale, or other foreign matter; and, where fine effects are desired, the surface is best made smooth or polished. Under given conditions of heating and oiling, the finer the polish the lighter is the bronze tint produced. In cases where ornamentation is obtained by relief, the salient parts should be most highly polished or most smoothly surfaced, in order that the colors produced upon them shall not be so deep as it is on those parts which are in the rear, so as to imitate thereby more nearly the effects of genuine bronze, in which the natural oxidation is apt to be worn somewhat away from its salient parts, and therefore lighter in color. When the iron is thus prepared I cover it with a very thin coating of linseed oil, or any oil which is the equivalent therefor, for the purpose here specified, (such a coating as I find best attained by applying the oil with a brush, and then rubbing off the oiled surface thoroughly with a rag, sponge, or other suitable imple-

ment,) and then place it in an oven, where it is submitted to a degree of heat which may be measured by an intensity sufficient to change a brightened surface of clean, unoiled iron to a color varying from a light straw color to a deep blue; the lowest degree of heat producing the lightest colored changes and the lightest bronze, and the highest degree of heat producing the darkest colored changes and the darkest bronze. It is important that the coating of oil be made extremely thin, as a coating of any material thickness will leave a rough and varied surface after the heat is applied. As the oiled iron becomes heated the color obtained will be bronze, of an intensity corresponding to the degree of heat employed; but it should be observed that the heat may be made so intense and so long continued as to destroy the oil, in which case the iron will lose the bronze tint acquired and will assume the dark-blue shade."

The defendant is said to have infringed the two reissues by the manufacture and sale of cast-iron butts, samples of which were produced and marked Exhibits A D and D D. These butts were colored in this way: The sunken parts are first covered with a black japan, and this coat of blacking is baked in an oven at a temperature not exceeding 320 deg. Fahrenheit. This japanning of the sunken parts is immaterial. It is not really claimed to be a Tucker bronzing; the object, probably, is to make a marked contrast between the sunken and salient parts of the butt. All but the sunken parts are then ground and subjected to a heat of 480 deg. Fahrenheit, which colors the iron a dark straw color. The ground parts of one of the exhibits are nearly or quite blue. A coat of copal varnish of substantial thickness is then put on and baked in a heat of not over 300 deg. Fahrenheit. This produces a material coating of oxidized varnish upon the surface of the iron which can be scraped up by a rapidly-drawn knife-blade, as a shaving rolls up before the knife of a plane. It was not claimed by the defendant that the varnish was not oxidized by the heat. No proof was offered by the plaintiff in regard to the oxidation of the iron during the second heating, and I do not think it of importance. The plaintiff relies upon the uncontradicted fact that by successive applications of heat the iron and varnish were oxidized; and if an iron surface oxidized by heat with a coating of varnish oxidized by heat necessarily makes Tucker bronze, then the defendant infringes the plaintiff's patents. This precise question has not apparently been the subject of discussion, either before Judge Clifford or Judge Lowell, and therefore it becomes necessary to ascertain the exact extent of the invention by the aid of the evidence which was introduced in regard to novelty, and which the defendant insisted proved that the Tucker process was practiced in its factory prior to 1859.

F. W. Brocksieper was in the employment of Peck & Walter, the Peck & Walter Manufacturing Company, and J. B. Sargent & Co., the predecessors of the defendant in New Britain, between 1849 and 1859, as the foreman in the ornamental department of their work, and is now a contractor in the defendant's factory in New Haven. He did the class of work hereafter described between 1856 and 1859, in New Britain, but the work of which I speak particularly was done after 1857, in a new kiln made under the superintendence of Mr. Gebhard, the head painter of the establishment, for the purpose of furnishing a very high heat. Brocksieper treated hat-hooks, coat-hooks, jamb-hooks, sash-fasteners, match-boxes, looking-glass frames, and cast-iron horses for saddler's windows in the following way:

"We had the castings cast with a facing, so as to come out of the sand very nearly entirely free of sand; then those castings rolled, drilled, and counter-sunk, the highest parts or the prominent parts of the ornaments brightened with sand-paper or emery-paper, brushed clean from dust, then sized and baked. In order to handle them easy, those hooks, we had them fastened on a block with a spring, and sized them in quantities as they were ordered, let them stand long enough so that the size would not stick to the fingers, then we put them in pans, or on hooks, and put them in the kiln to bake."

The size was a mixture of equal parts of turpentine, copal varnish, and linseed oil, and was applied in a very thin coat, put on with a stiff, fine brush as lightly as he could. The kiln was heated to 420 degrees Fahrenheit. Several batches of hooks of from 12 dozen to 24 dozen each, between 100 dozen and 200 dozen sash-fasteners, about 100 looking-glass frames, and horses in "considerable quantities," were made and sold. The match-boxes were probably made in larger quantities.

It is manifest that this style of ornamentation did not become a marked feature of the defendant's business. It was not caught up as an attractive style by their customers, though Brocksieper was much pleased with it, and did what he could to press it upon the attention of his employers. While there is no doubt that the reproductions of this method of coloring, which were made by Mr. Ruff under the eye of the examiner, are Tucker bronze, I do not think that the articles which were made in 1857 were precisely of the same character, for if they had been they would have received the prompt attention of the public.

The plaintiff says that they were not made by his process for two reasons: *First*, that there is no evidence that the iron was oxidized by the heat, which is an essential part of his process. All the testimony in regard to the manner of manufacture shows that the iron

must have been heated so as to be oxidized. The kiln was sufficiently hot; the coating of size was sufficiently thin. That there was no oxidation rests in theory alone. The *second* reason is that the coating was too thick to make genuine Tucker bronze, and the plaintiff's counsel quote the language of the specification to show the stress which the patentee placed upon the thinness of the oil coating. Upon this point I think the plaintiff is right. There was oxidation, but there was a coating of baked size over the oxidized iron, which was a different thing from the result produced by the plaintiff's process. The articles which were manufactured did not have the beauty of Tucker bronze, but presented the appearance of a varnished or painted article. It follows that bright cast iron oxidized, and covered with a coat of oxidized oil, varnish, or size, may be, but is not necessarily, Tucker bronze.

Tucker bronze is a new surface of the iron produced by the joint oxidation, or by the successive oxidations, of the iron and a film of oil or varnish thereon, by means of high heat, and is not a new coating of oxidized oil or varnish upon the iron. The oil must be applied in such a way that after oxidation there is no substantial covering of baked oil upon the surface of the iron. The surface of the iron is a bronzed surface, because the film of the oil is so thin and is so closely united with the pores of the iron as to be almost a part of it, and does not form a substantial covering like a coat of varnish over the surface of the iron. In Tucker bronze, which has been subjected to one heat, the film of oil can with difficulty be scraped off with a knife. When the iron has had two or three successive applications of oil, and has been heated two or three times, the oil comes off by scraping, in the form of little flakes or of powder.

Tucker's discovery was that bright cast iron, covered with a thin film of oil, would take on, by the action of high heat, a new surface resembling bronze. The defendant covers the oxidized surface of the iron with an oxidized coat of varnish. It does what Brocksieper did in 1857, except that it takes two steps instead of one to accomplish the result.

Let the bill be dismissed.

**ALLIS and others v. STOWELL, Survivor, etc.**

(Circuit Court, E. D. Wisconsin. July 26, 1881.)

**1. LETTERS PATENT—SAW-MILL DOGS—ANTICIPATION.**

Selden's device, known as a saw-mill dog, *held* to have been anticipated, and therefore to be invalid.

In Equity.

*W. G. Rainey*, for complainants.

*Flanders & Bottum*, for defendant.

DYER, D. J., (*orally*.) There was, some time since, heard and decided in this court the case of *Allis v. Stowell*, involving the validity of certain patents, one of which was issued to one Selden, and the other to one Beckwith, upon certain devices known as saw-mill dogs. Both patents were sustained, and injunctions were granted. Subsequently, an application was made to reopen the case as to both patents, and after hearing, and investigation of the questions involved, a rehearing was granted as to the Selden patent, but not as to the Beckwith patent. The case has now been argued before the full bench upon testimony that has been submitted with reference to the validity of the Selden patent, and as to whether it was not anticipated by the devices that are claimed to have been made and sold as early as 1845, and subsequently by one Page, at Washington, and one Duval, at Zanesville, Ohio. Testimony upon the rehearing, and touching the validity of the Selden patent, has been fully taken, and we have to pass upon the case in the light of the new facts that have been developed. There has been produced what is known as the Duval device. Certainly, the similarity between this device, which anticipated by many years the Selden, and the Selden dog, is quite striking, as is apparent upon mere inspection.

A change of the original decree is resisted by the complainants, substantially upon two grounds; the first being that the principal witness for the defendant stands in such an attitude, and occupies such a relation to the defendant, as requires the court to entirely disregard his testimony. The other is that there is such a defect apparent in the construction of the Duval device as must satisfy the court that it could not be made an operative machine. Of course the rule is familiar, that where it is claimed that a patented device is anticipated by another, and that there has been a prior use, it is necessary to show, not, perhaps, that the anticipating device has been actually used, but certainly that it was capable of practical and suc-

cessful use. It is contended by counsel for complainant that this fact is not established in this case.

We cannot, upon careful consideration of the testimony, agree with counsel that the testimony of the witness Robinson, who is one of the witnesses for the defendant, should be entirely disregarded by the court. It seems to be corroborated by other testimony in the case. He is corroborated by the presence of the device which it is claimed anticipates the Selden dog, and which is produced in court, and that is a very powerful circumstance influencing the mind of the court in coming to a conclusion upon that question. Then we have also the account book which was kept at the time this device was sold, as far back as 1865 and 1866, which contains entries showing such sales. And so we conclude that the case does not stand alone upon the testimony of the witness Robinson. Then, further, we think that the testimony and the device itself, as it is exhibited to us, show that it was capable of practical use.

I may say here that at the first hearing I had not a little difficulty in determining this very question relative to the Selden dog; and it seems to us, upon a comparison of the devices, and upon the best light that we can extract from the testimony that is now submitted, that the testimony is quite as strong that the Duval device is one that could be practically and successfully used, as was the testimony in the original case that the Selden device could be so used. So, without elaborating upon the case, or attempting the delivery of an opinion *in extenso*, we content ourselves with announcing our conclusion, which is, that these devices, which have been submitted as anticipating the Selden dog, should be held to anticipate it, and therefore that the Selden patent must be declared invalid.

I am authorized to say that Mr. Justice HARLAN concurs in this conclusion.

**DEDERICK v. CASSELL and others.\***

(Circuit Court, E. D. Pennsylvania. October 6, 1881.)

**1. PATENT—REISSUE—DIVISION AND ENLARGEMENT OF CLAIMS—WHAT IS NOT “NEW MATTER.”**

While such extensive division and enlargement of claims in reissues as tends to confusion and litigation is reprehensible, it affords no legal ground of objection to the reissues unless “new matter” is introduced, and nothing plainly embraced in the specifications, model, or drawings is “new matter.”

**2. SAME—SUBORDINATE COMBINATIONS NOT CLAIMED IN ORIGINAL PATENT.**

While language may be found in *Gill v. Wells*, 22 Wall. 1, and a few other cases, which, standing alone, might justify a belief that where a general combination embraces minor subordinate combinations not claimed in the original patent, a subsequent introduction of claims for the latter is invalid, yet such a conclusion cannot be reconciled with what has been decided elsewhere, both before and since.

**3. SAME—PRESUMPTION AS TO VALIDITY.**

A reissue is entitled to a presumption in its favor, and to justify its rejection, on the allegation of “new matter,” it must clearly appear that such new matter has been introduced.

**4. SAME—COMBINATION—INFRINGEMENT.**

A new combination is infringed whenever another employs substantially the same combination in plan and elements, operating in the same manner and producing substantially the same result. The doctrine of equivalents, with slight modification, applies with as much force to such an invention as to any other.

**5. SAME—IMPROVEMENTS IN BALING PRESSES.**

Claims Nos. 3, 5, 7, 8, 10, and 11 of reissue 8,130, No. 3 of reissue 8,316, Nos. 3 and 11 of reissue 7,983, No. 6 of reissue 8,292, and No. 1 of reissue 8,296, for improvements in baling-presses, *held* valid, and respondent's machine *held* to be an infringement.

**6. SAME.**

Claims Nos. 4 and 6 of reissue 8,130, No. 2 of reissue 8,316, No. 5 of reissue 7,983, Nos. 6, 7, 8, 10, and 11 of reissue 8,312, and Nos. 2 and 5 of reissue 8,292, *held* invalid.

**Hearing on Bill, Answer, and Proof.**

Bill for injunction against infringement of reissues of patents issued to complainant for improvements in baling-presses. The answer denied novelty, alleged that the reissues contained “new matter,” and denied infringement. The facts are sufficiently stated in the opinion.

*L. Hill*, for complainant.

*C. E. Marsh, J. Pusey, and Collier & Bell*, for defendants.

**BUTLER, D. J.** The suit embraces seven patents, for “improvements in baling-presses,” numbered 8,130, 8,316, 7,983, 8,312, 8,292, 8,296, and 187,220. The last named, however, the plaintiff has withdrawn.

\*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.



The first and second are reissues derived from original 132,566, dated October 29, 1872; the third and fourth are reissues derived from original 132,639, of same date as 132,566; the fifth is a reissue of original 151,477, dated June 2, 1874, and the sixth a reissue of original 177,216, dated May 9, 1876. As the case now stands the respondent is charged with infringing 22 claims, being the third, fourth, fifth, sixth, seventh, eighth, tenth, and eleventh of 8,130; the second and third of 8,316; the third, fifth, and eleventh of 7,983; the sixth, seventh, eighth, tenth, and eleventh of 8,312; the second, fifth, and sixth of 8,292; and the first of 8,296. The fourth and sixth of 7,983, and the fourth of 8,296, included in the bill, have been withdrawn; and the fifth of 8,292, which was not so included, has been introduced by agreement.

The answer denies the validity of the several patents and claims, and the charge of infringement.

The issues raised can only be disposed of intelligently, by considering each patent and claim separately. It is not necessary, however, to state at large our reasons for the disposition made of them. To do so would require a written analysis of the various machines and devices exhibited to prove anticipation, and a comparison of their several parts with the respective claims of the plaintiff, as well as a dissertation on the former state of the art, which would involve much useless labor and much more time than can be spared for the purpose. The questions of law are neither new nor difficult; and the questions of fact are such as commonly arise in patent cases. I shall, therefore, do little more than state conclusions. A few considerations, common to all the patents, and many of the claims, can be disposed of most profitably, at the outset.

As has been stated, the original letters were surrendered, and reissues obtained, (for separate minor, or subordinate, combinations as respects 132,566 and 132,639,) with the several claims of each original divided and enlarged. While this extensive division and enlargement of claims (induced, probably, by a nervous apprehension of future difficulties) tends to confusion and litigation, and is therefore reprehensible, it affords no legal ground of objection to the reissues, unless "new matter" has been introduced. The introduction of "new matter" is forbidden by the statute. Nothing, however, plainly embraced in the specifications, model, or drawings, is regarded by the courts as "new matter:" *Bentz v. Elias*, 6 O. G. 117; *Thomas v. Manuf'g Co.* 16 O. G. 541; *Glue Co. v. Upton*, 6 O. G. 830; *Aultman v. Holley*, 11 Blatchf. 317; *Smith v. Goodyear*, 11 O. G. 246;

s. c. 11 Otto, 486. While language may be found in *Gill v. Wells*, 22 Wall. 1, and a few other cases, which, standing alone, might justify a belief that where a general combination embraces minor, subordinate combinations, not claimed in the original patent, a subsequent introduction of claims for the latter, is invalid. Such a conclusion, however, cannot be reconciled with what has been decided elsewhere, both before and since: *Henry v. Nelson*, 12 O. G. 753; *Kerosene Lamp Co. v. Littell*, 13 O. G. 1009; *Stevens v. Pritchard*, 10 O. G. 505; *Brown v. Selby*, 23 Wall. 181; *Seymour v. Morgan*, 11 Wall. 544; *Pearl v. Ocean Mills*, 11 O. G. 4; *Christman v. Ramsey*, 17 O. G. 95; *Sussell v. Spaeth*, 14 O. G. 274. The patent, whether a reissue or an original, is entitled to a presumption in its favor: *Railroad Co. v. Stimpson*, 14 Pet. 448; *Stevens v. Pritchard*, 10 O. G. 505; *Rossner v. Anness*, 13 O. G. 870; *Smith v. Goodyear*, 5 O. G. 585. To justify the rejection of a patent or its claims, therefore, on the allegation of "new matter" it must clearly appear that such matter has been introduced. A careful examination of the originals and reissues involved in this case has not satisfied us that "new matter" has been introduced.

These patents are, principally, for new combinations. A majority of patents granted in modern times, are for such inventions; and they are none the less entitled to protection, and none the less valuable, on this account. A new machine, or a new manufacture is thus produced, whereby new and useful results are obtained. Such a machine is infringed whenever another employs substantially the same combination, in plan and elements, operating in the same manner and producing substantially the same result. The doctrine of equivalents, with slight modification, applies with as much force to such an invention as to any other: *Gould v. Reese*, 15 Wall. 192; *Seymour v. Osborne*, 11 Wall. 556; *Gill v. Wells*, 22 Wall. 14, 15. Where, however, there is a difference, not in form simply, but in substance,—a difference in plan or combination,—in short, a difference in invention, of course, the one machine will not infringe the other. The old elements from which one individual has drawn are open to all. It is the peculiar combination which one has effected that another shall not copy. It is the substance of the combination, however, and not the form, that is to be regarded. If the same plan, and substantially the same means of carrying it out, be employed, it is but copying.

That the plaintiff's press (considered as an entire machine) is the result of a new plan and new combination; that invention was necessary to produce it, and that great benefit has resulted from its pro-

duction and use, we cannot doubt. An extended inquiry respecting the state of the art prior to its invention, in 1872, is unnecessary. The baling-presses employed for hay, up to that time, were of a primitive character. The upright press, principally used, consisted of a box or tube of about three by five feet in diameter, in which a platen or traverser moved, compressing the hay and forming the bale, by a single movement. While the hay was thus held in position, doors in the side of the box were opened and the bale was bound and removed. The platen was then drawn up, and the operation repeated. The bale rested on its side while within the box, and consequently was pressed and bound transversely. Longitudinal presses had been constructed, by laying the box or tube above described, upon its side, into which the hay was inserted through doors on top. After tramping, the doors were closed, and the platen moved forward until the hay was compressed, when they were opened, and the bale bound and removed. Beater-presses, referred to by the witnesses as in use to a limited extent, were similar to the two described, having a device, however, to supply the necessity for tramping while the box was being filled. For baling cotton, presses of similar construction, though somewhat more ingenious and complicated, were employed. None of the several machines referred to, however, were like the plaintiff's, either in plan or combination of parts, or capable of performing its functions. If it be true, as alleged by the defendant, that all the parts embraced in the plaintiff's press, may be found in the various devices previously used to compress hay, cotton, peat and clay, the plaintiff's right to the new combination which he constructed, would be none the less complete. It will not answer to say this required no invention, that any mechanic might have selected the parts and combined them. The same might be said with equal force in almost every instance in which a patent for combination is issued. The fact that no mechanic did select and combine the parts, and produce such a press, notwithstanding the great need for it, is a sufficient answer to the suggestion.

The invention consists in constructing a machine whereby hay may be pressed, baled and tied off in a straight tube, open at both ends, by a continuous operation, each bale completed being expelled by the process of forming another behind it, and all interruption from feeding and removing bales, thus avoided. Such a press was never before constructed, and such a result never before obtained. The press consists of—

“A horizontal tube, open at both ends; a ram or ‘traverser’ working back and forth rapidly in one end of the tube, by means of a sweep, crank and pitman.

which enabled the horse or other power to move forward continuously without stopping or reversing, and which caused the ram to make strokes or movements of fixed extent and equal power; an opening in the top of the tube, into which the hay was fed, one forkful at a time, so that each forkful would be thrust forward to a fixed distance by the next stroke of the ram, and thereby compacted into a vertical section of pressed hay; retaining-shoulders in the walls of the tube, at or near the forward limit of the movement of the ram, to keep the hay sections from expanding backward on the return stroke of the ram; grooved partitions, to be inserted between the bales and moved along in the tube with them, to separate one bale from another, and to facilitate the introduction of the bands; tie-slots in the sides of the tube, to enable the bands to be introduced, passed around the bales, and tied off without interrupting the feeding, pressing, and discharging operations; provision for adjusting the walls of the tube towards or from each other, to regulate the friction upon the sides of the bale; and a springing or yielding front face to the ram or 'traverser,' to prevent the hay from overlapping it and binding between its upper edge and the top of the tube."

This is the plaintiff's language, but, as a general description it is accurate. That the defendants' press infringes, we do not doubt. Whether all the plaintiff's claims are valid, and so infringed, is yet to be considered. But, looking at each press as a whole, and comparing the two, we find no material or substantial difference. Each has a crank-toggle and reciprocating traverser, a press-box and bale-chamber, with tying-slots and retaining-shoulders at its rear end; each builds up a bale of separately-compressed sections, and discharges it when formed, through the forward end, by means of additional charges, and each has the adjustable sides at the front of the bale-chamber to regulate the friction of the passing bale. In short, the hay is received, pressed and formed into bales, held in position, bound and discharged, by the two presses substantially in the same manner—practically by the same means and mode of operation, and with substantially the same result. Horizontal tying-slots are found on but one side of the defendants' (while the plaintiff's has them on both,) but a vertical slot or opening on the other, is substituted for passing the bands (the only office of tying-slots.) Neither this nor any other difference found, is deemed material. They are differences in form, that add no value to the machine. The defendants' will do nothing which the plaintiff's will not do as well and as expeditiously. The absence of advantage in the complicated method of passing the bands—rendered necessary by omitting the slots on one side—and the other differences in construction, might suggest the thought that these differences were resorted to in the hope of escaping responsibility for infringement.

Turning now to the several letters patent, and taking up the respective claims involved in their order, we find that of reissue 8,130 they are three, four, five, six, seven, eight, ten and eleven, which read as follows:

"(3) The slots I, in combination with the bale-chamber C, provided with shoulders, substantially for the purpose set forth. (4) The above-described method of successively ejecting finished bales from a press by means of additional charges of material forced within the chamber. (5) The procumbent or horizontal press-box and bale-chamber B C, constructed with a feed-orifice at the top, as at A, and provided with horizontal side-tying slots I, substantially for the purpose set forth. (6) A press for baling hay, cotton and other fibrous material that is bound into bales, so constructed, combined and operated that the hay is fed in or pressed at one end of the chamber and forced out at the other end by a common traverser and simultaneous operation, as set forth. (7) A press for baling hay, cotton and other fibrous material that is bound into bales, so constructed, combined and operated that the finished bale is forced out of one end of the chamber as the loose material is fed in or pressed at the other end by a common traverser and simultaneous operation, as set forth. (8) The traverser E, constructed with a contracting or yielding front, to wedge together when the hay overlaps it, substantially for the purpose set forth." "(10) The retaining-shoulder H, in combination with the bale-chamber C and traverser E, for the purpose set forth. (11) In a procumbent press, in which the hay and other loose material is pressed in sections into bales, the slots I, in combination with the press-case B C and traverser E, for the purpose set forth."

Of the above, three, five, seven, eight, ten and eleven are valid. The proofs sustain the presumption of novelty and utility. Eight is for an improved traverser; seven is for the complete machine; while the others are for minor or subordinate combinations embraced. That the traverser is new is admitted; that its novelty is useful, and involved invention, is quite clear. The novelty and utility of the completed machine, and the validity of the claim for it, have already been fully considered. The objection urged against some of the claims to minor combinations, that the parts do not co-operate or combine in action, does not seem to be sustained by the proofs. Six we find to be identical with seven, and the double claim cannot be sustained. Four, properly construed, is also identical with seven. It is for the *effect* produced by constructing and operating the *plaintiff's* press. It could only be infringed by doing this. The language,—the "above-described method,"—and the otherwise implied reference to the specifications, require the claim to be read as one for the *plaintiff's method of operating his press*. In *Blanchard v. Sprague*, 3 Sumn. 279, this construction was made where there was much less to justify it,

and it has been adopted in numerous other instances: *Stone v. Sprague*, 1 Story, 270; *Gray v. James*, Pet. C. C. R. 394; *Jones v. Pearce*, Webster, P. C. 123; *Blanchard Co. v. Warner*, 1 Blatchf. 209; *Railroad Co. v. Dubois*, 12 Wall. 47; *Clark v. Busfield*, 10 Wall. 133. If it were for a *method* independently of the plaintiff's press, it would be bad for want of novelty. The same method of ejecting substances out of presses—by successive charges of material behind—has been in use time out of mind. The presses for peat and brick, exhibited by the defendants, show it. That the substances were not hay, baled or unbaled, is not important. The *method* was the same; the application of it to other material would be but another use. The suggestion that the substance so ejected was not hay baled and ejected as the plaintiff does it, brings us back to the point at which we started, by illustrating that the claim is not for an independent process, but for the *plaintiff's, as performed by his particular machine*, involving his entire invention. In either view, however, the claim cannot be allowed.

Of reissue 8,316 the claims involved read as follows:

"(2) The combination of the sweep or horse-lever with the crank F and pitman L, for operating the traverser of a baling-press. (3) The crank or toggle L F, in combination with the traverser E, receiving-box B, and bale-chamber C, substantially as described."

Properly construed, these claims embrace the same matter. If the first were confined to the language in which it is expressed, it would probably have to be rejected for want of novelty; for it would thus seem to be for a new application of an ordinary horse-power, requiring no invention. That the plaintiff intended it to be so confined, is rendered quite probable by the insertion of the next claim—which involves the same matter, in combination with other elements of his press. The same combination, however, is incorporated in the first by necessary implication. It must therefore be rejected,—the second of the two being allowed, because of its greater perspicuity. There is no reason to doubt the novelty or utility of this claim, or to question its validity on any other account.

Of reissue 7,983, the claims involved are as follows:

"(3) In a horizontal baling-press, in which the bales are compressed and ejected through the end, the bale-chamber D, constructed with tapering or adjustable sides, to regulate the resistance offered to the passage of the bale, for the purpose of compressing and hardening it, substantially as described."  
"(5) The press-head formed of the previously completed bale, substantially for the purpose set forth." "(11) The follower O, as the partition or separation between the finished and forming bale, as set forth."

The third, the proofs show to be a novel and patentable combination. We do not think any of the devices exhibited by the defendants, prove anticipation. Its utility cannot be questioned.—The fifth is invalid. The bale, claimed as the “press-head,” forms no part of the patented machine. It is the product of the press—the result of its operation in use.—The eleventh—for the “follower O, as a partition,” refers to the “follower O” described in the specifications. No valid objection to it is shown.

Of reissue 8,312, the claims involved read as follows:

“(6) The toggle G F, connected to the reciprocating traverser C, in combination with the press-case B D, provided with a yielding head or resistance, for the purpose set forth. (7) The press-box B, reciprocating traverser C, in combination with a bale-chamber, D, provided with a movable partition between the forming and finished bales. (8) The process of forming the bale within the chamber by means of a movable partition, the traverser, and the previously-compressed bale, substantially as described.” “(10) In a baling-press, the crank, eccentric, or cam, or the toggle F G, in combination with the reciprocating traverser C, and baling-chamber B D, provided with a movable partition frame for the bales. (11) The bale-chamber D, provided with stationary retaining-shoulders, in combination with a movable partition for the bales.”

The sixth differs from the third of 8,316 only in the last element named—“the yielding head of resistance”—and as this element is admitted to be the “finished bale,” embraced in claim 5 of 7,983, which we have already considered and rejected, this claim also must be disallowed. The distinguishing feature of the seventh, eighth, tenth and eleventh, is the “movable partition” in the combination stated. If by this partition is meant a plain slide (a partition without grooves,) as the plaintiff’s testimony, as well as the language employed to describe the device, would indicate, the claims are unjustifiable. No such partition is indicated in the specifications, drawings or model,—for the very good reason, no doubt, that its use would be impracticable in the press. The partition there shown is the grooved “follower O.” The language of the specification is, “the follower O, with tying-grooves, is inserted in the press-box in the rear of the finished bale, and forced along with it,” thus constituting a partition between the bales, and facilitating the passage of bands. In the original patent a single claim is founded on this, in the following words: “(10) The follower O, constructed with grooves on both sides, in combination with the bale-chamber,” etc.

In the reissue 7,983 two claims are founded upon it, as follows:

“(6) The follower O, constructed with grooves on both sides for the

ties, in combination with the bale-chamber," etc.; and "(11) The follower O, as a partition or separation between the finished and forming bale."

Whatever the plaintiff may have intended by the term "movable partition," as employed in the claims now under consideration, it must be held to refer to the "follower O," the only movable partition contemplated in the original application for a patent. The attempt to found four additional claims on this device, as here exhibited, is censurable. If the purpose was to vary the character of the device, it was an effort to expand the scope of the invention. If not this, it is a senseless, confusing, and therefore mischievous, multiplication of claims for the same subject-matter. Construing the term "movable partition" to mean the "follower O," everything embraced in these claims is fully covered by the sixth and eleventh, just referred to. Reading the latter in connection with the specifications and drawings (as we must,) they include every element and combination here embraced. The "process," as it is called, in the eighth, is simply the operation and effect of the plaintiff's press, with the "follower O" used in the manner set forth in the specifications. The claims are disallowed.

Of reissue 8,292, the claims involved read as follows:

"(2) In that class of horizontal presses in which the hay is fed and pressed in sections by a reciprocating traverser and crank, or toggle power, as set forth, the *loose or adjustable sweep or horse-lever*, for the purpose set forth." "(5) In that class of baling-presses in which the hay is fed and pressed in sections, a press-case provided with a *screen-bottom under the reciprocating traverser D*, and in combination with the same, for the purpose set forth. (6) In a baling-press in which the material is compressed in sections by a reciprocating traverser, the pressing devices so arranged and operated that the reaction or elasticity of the pressed material shall reverse the traverser without turning the horse-lever or sweep."

Here, again, two of the claims—the second and sixth—embrace the same matter. Each is substantially for an arrangement of the power and pressing devices (such as is described in the specifications and shown in the model and drawings,) to prevent the reaction or rebound of the pressed material throwing the lever against the horses. The matter embraced is new and patentable, but the double claim cannot be allowed. While it may be a matter of indifference whether the one or the other be rejected, we will reject the second and allow the sixth. In the fifth the only element demanding consideration is "the *screen-bottom*" under the reciprocating traverser. The claim is not to the screen (and could not be, for this is a very old device,) but is



for placing it in the press-box under the traverser. It is for an improvement added to the press in 1874. A similar screen is found in the Wallen patent for "baling-presses," of 1872,—inserted in the bottom of the press-box, and partly, at least, under the traverser, or the space over which it passes, designed for the same use, and answering for the same purpose as in the plaintiff's. That it is less serviceable in the Wallen press is not important. This results not from any difference in the device, or its location in the box, or combination with the traverser or other parts of the press, but from the difference in the presses themselves, and in the methods of forming bales. In Wallen's the bale is formed in the press-box, into which the required quantity of hay is placed before any pressure is applied, thus affording but little opportunity for the escape of dust through the screen below; while in the plaintiff's the bale is formed in a separate chamber, into which each forkful of hay is pushed, as pitched in, thus allowing the dust of each in succession, to fall upon and pass through the screen. This difference, or peculiarity of construction in the plaintiff's press, does not aid his claim for the improvement under consideration. The press, as we have seen, is covered by previously-issued patents. He is entitled to no greater consideration as respects this improvement of it, than a stranger would have been, if he had made it. His claim can only be, as in terms it is, for adding a screen to the press previously constructed and patented, just as he did it. In this view it is plain that what he did was but copying what Wallen had done. There was nothing whatever new about it. The claim is therefore disallowed.

Of reissue 8,296, the only claim involved is the following: "(1) The press-case provided with one or more apertures, O, for the purpose set forth."

We do not find any valid objection to this claim, which is, as the one preceding was, for an improvement. It was a useful addition, and was novel. That it was not inserted in the original patent for the improvement is unimportant. It is very plainly described in the specifications; and, although an occasional use of it only, was then contemplated, the propriety of inserting it in the reissue cannot now be questioned.

This disposes of the several claims, so far as respects the question of *validity*. The question of *infringement* need not occupy much more time than has already been devoted to it, in contrasting the two presses as complete or entire machines. To the third, fifth, tenth and eleventh claims of 8,130, and the third of 8,316, which

are for combinations into which the plaintiff's bale-chamber enters as an element, the defendant answers that he does not use such a bale-chamber, and consequently does not infringe. What we have already said in comparing the two presses, generally, disposes of this answer, so far as we are concerned. We are unable to discover any material difference in the two bale-chambers; and finding the several combinations and matters involved in these claims, embraced in the defendants' machine, we must, and do, find them to be infringed. This leaves for consideration the seventh and eighth of 8,130, the third and eleventh of 7,983, the sixth of 8,292, and the first of 8,296. As, however, the seventh of 8,130 embraces the entire press, the question of infringement, respecting it, is already disposed of.—The eighth is very clearly infringed. The defendants' traverser is so like the plaintiff's that they can hardly be distinguished; in character and effect, they cannot be. The formal difference resorted to by the defendants is immaterial. The third and eleventh claims of 7,983, the sixth of 8,292, and first of 8,296, are also infringed. The matters claimed distinctly appear in the defendants' press.

This disposes of a case (so far as we are concerned) that has involved an unusual expenditure of time and labor, and in which the interests of both parties have been presented with unusual ability.

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ATLANTIC GIANT POWDER CO. *v.* DITTMAR POWDER MANUF'G CO. and others.

(Circuit Court, S. D. New York. September 27, 1881.)

1. INJUNCTION—CONTEMPT OF COURT.

Disobedience to an injunction is none the less a contempt of court because the act is done in good faith, as not prohibited by the order, or under advice to that effect.

2. GLUKODINE.

Glukodine is a mechanical mixture, not a new chemical compound

*Gifford & Gifford*, for plaintiff.

*Lexon & Huldane*, for defendants.

BLATCHFORD, C. J. This is a motion for an attachment against the defendants, the Dittmar Powder Manufacturing Company and Carl Dittmar, for violating the preliminary injunction issued and served herein, by making and selling a blasting powder called "glukodine powder." I am of the opinion, from the testimony, that what the defendants call glukodine is a compound made by a mechanical

mixture of nitro-glycerine with nitro-saccharose, (or nitrated sugar,) and is not a new chemical compound; that the constituent nitro-glycerine is shown to be separable, as such, from the constituent nitro-saccharose; and that the nitro-glycerine used is so combined with absorbents of it as to make a dry powder, safe to handle, transport, and use. The nitro-glycerine is so availed of as to produce practically the same effect as if it were not mixed with any nitro-saccharose. It is the explosive element in the powder. It is combined with a solid absorbent substance, "whereby," in the language of the specification of No. 5,799, "the condition of the nitro-glycerine is so modified as to render the resulting explosive compound more practically useful and effective as an explosive, and far more safe and convenient for handling, storage, and transportation, than nitro-glycerine in its ordinary condition as a liquid." The absorbent substance is, in the language of said specification, "free from any quality which will cause it to decompose, destroy, or injure the nitro-glycerine," and the absorbent absorbs and retains "a sufficient amount of nitro-glycerine to form an efficient explosive." The matter seems to be so free from doubt as not to fall within the cases where a new suit has been required to reach the article complained of. The absorbent is, in its use, an equivalent of the absorbent of the patent, and I see no doubt on the question of infringement. Disobedience to an injunction is a contempt of court. Rev. St. § 725. The injunction in this case forbade the making, using, or selling certain powders described in it, and any powder substantially like any of said designated powders, and any infringement of said patent. What the defendants did they did not do accidentally or unintentionally, but knowing fully what they did. They were, therefore, guilty of contempt. What they did is not the less legally a contempt because they did not think they were infringing, or were advised that they were not. Any question of *animus* can bear only on the extent of punishment. The patent is still in life. *De Florez v. Reynolds*, 17 Blatchf. 436.

The powders now passed upon are those known as No. 2, No. 3, No. 4, and No. 5. As to them an attachment must be issued.

**ARBO v. BROWN and others.\****(Circuit Court, E. D. Louisiana. 1881.)***1. INEVITABLE ACCIDENT—DAMAGES.**

Damages resulting from an inevitable accident must be borne by the party on whom they fall. Hence, where a steamer that was safely moored for all ordinary emergencies broke loose in a storm and inflicted damage on other shipping, her owners cannot be compelled to make good the loss.

**In Admiralty.**

*R. K. Cutler*, for libellant.

*E. H. Farrar*, for defendants.

PARDEE, C. J. The evidence shows that September 1, 1879, libellant was the owner of a barge loaded with wood, moored in the harbor of New Orleans, at the foot of Delachaise street, near the Louisiana ice works.

On the same day the Governor Allen, a dismantled steam-boat, being without engines, chimneys, etc., but with her boilers taken down and piled amidship, was, and had been for some time, moored on the opposite side of the river, and nearly abreast the wood-boat of libellant. The Allen was lying head up stream, and she had out some eight lines, fastened to check-posts and dead-men. Some of these lines had been in use some time and some of them were doubled, but the bow or head-line was new, and the stern-line nearly new. According to the weight of evidence, (and upon this there is only one objecting witness,) the Allen was, apparently, securely and safely moored, with a watchman aboard. On this first day of September a storm, prevailing from the day before, rose into a hurricane about 11 o'clock in the morning, blowing at the rate of 40 miles an hour, and continuing until about 11 o'clock at night. About 2 o'clock of the afternoon, and during this storm, the Allen broke away from her moorings, the stern and breast-lines giving way first, some parting and others pulling up dead-men, and pulling up and breaking off check-posts, letting the stern of the Allen blow out stream, when the check-post to which the head-line was tied also pulled up, and the storm carried the Allen directly over the river to the libellant's wood-boat. The Allen went over the river sideways and struck the wood-boat sideways, or broadside, driving her guard up and over the wood-boat. She struck the wood-boat with great force, and, it is probable, broke in and injured her side towards the stern. As the Allen's guard was forced over and on top of the wood-boat, the Allen was listed or careened to the other side. Lines were at once got out, and the Allen was tied, with head, stern, and breast-lines, in a place where a tug-boat could not have pulled her out while the storm prevailed. The listing of the Allen to windward exposed her seams above the water-line, which were open from long exposure to the force of the waves and water, and the Allen began to fill. As she filled she listed more, and then the boilers, piled on deck, rolled down to the guard, and it is probable it was then too late to right the boat, even if she could have been got off. Soon after the

\*Reported by Joseph P. Horner, Esq., of the New Orleans bar.

Allen reached this side two of the libellees, alleged owners of the Allen, reached the place. These parties, with others, made various efforts to prevent further injury, and to get the Allen off, without avail. Everything was done or attempted that could be done, or was suggested, except that the parties favorable to the wood-boat asked or suggested that the lines of the Allen should be loosed and so let her float down stream and sink by herself. Upon this last suggestion a difference of opinion was expressed. Some thought that such a course would save the wood-boat; others that the Allen was a protection to the wood-boat; and there was still another opinion, which was probably the better one, that the Allen could not be got out or floated out until the gale that blew her in had subsided. Anyhow, nothing was done at that time, and soon after Capt. Brown, the managing man, went away. Some time after this, and after the Allen sank, a Mr. Buck, under the direction of a lame man, cast off the bow-line, so as to let the Allen go clear of the wood-boat, and the Allen slid down stream; but her stern-line not being cast off she pulled out a check-post on the wood-boat, and that and the Allen together tore off some of the planks of the wood-boat and set a lot of the wood adrift. This suit is brought by the libellant to make the owners of the Allen liable for his damages suffered to the wood and barge.

Under the facts of the case I am of the opinion that the owners were not in fault, and that the damages suffered by the libellant were the result of inevitable accident. The Allen was safely moored for all ordinary and foreseen emergencies. The evidence shows that when she broke away one check-post pulled up and was carried by the hawser across the river, and was a cypress stick of about 15 feet in length, that had been standing for years for the earth to settle and pack around it, and it was set some 10 feet in the ground. The hurricane was unusual, and could not have been foreseen. As counsel say, "that storm was historic;" it flattened cane crops, blew down and unroofed houses and sugar-houses; trees were blown up by the roots; wood-boats, steam-boats, and coal-boats were blown adrift and wrecked in this harbor. What took place on this side of the river was the inevitable result of the collision of the Allen with the wood-boat; and, so far as I can see, there was no carelessness nor negligence on the part of the owners notified, on this side of the river. Everything seems to be done that would likely to be of any service in protecting property. What was asked by the libellant's friends,—the loosening of the new lines put out on the Allen, and the neglect and refusal of which is the gravamen of the libel,—seems to have been improper, because, when done later, the damage was increased.

Inevitable accident is that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, or nautical skill. See 2 Wall. 556; 14 Wall. 215; 24 How. 307.

I am satisfied that neither ordinary care, caution, nor nautical skill could have prevented the occurrences which resulted in the damages of which libellant complains. When a collision takes place by any inevitable accident, or by any *vis major*, the loss is to be borne by the party on whom it falls. See Desty, Adm. § 384, and authorities cited in note 11.

This conclusion reached, renders it unnecessary to go further into the case; but, having carefully examined the whole evidence, I may say that I have been forced to the conclusion that the damages actually suffered by libellant, growing out of the collision with his wood-boat and the Allen, have been enlarged and magnified, and, if he had otherwise a case, he could not recover over some \$40, with costs doubtful. The custom of selling wood by short measurement is not lawful, reasonable, or moral, and, if proved, cannot be invoked to prove more cords of wood on a flat-boat than the boat will hold, so as to enhance damages in a case of collision.

Let a decree be entered dismissing the libel, with costs.

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TURNBULL, MARTIN & Co. v. EIGHTY-SEVEN BLOCKS OF MARBLE.

(District Court, E. D. Louisiana. March 24, 1881.)

1. BILL OF LADING—UNLOADING CARGO.

The ship-owners can recover from the consignees the expense incurred by them in unloading the vessel, where the bill of lading provides that the cargo should be delivered from the ship's deck, when the ship's responsibility should cease.

In Admiralty.

*E. W. Huntington*, for libellants.

*T. C. W. Ellis* and *Emmet D. Craig*, for claimants.

BILLINGS, D. J. The amount claimed by the libellants in this cause is made up of three items, viz.: freight, \$1,476.97; demurrage, at \$150 per day, \$450; and expenses for labor, \$445.50. It is admitted by the claimants that the amount claimed for freight is due, and that sum has been tendered and deposited in the registry of the court. As to the second item, demurrage, it does not appear by preponderance of evidence that the delay in unloading was caused by the fault of the consignees. The claim for this item is therefore rejected. As to the third item—\$445.50 expenses in unloading the marble. This expense was incurred in transporting the marble from the ship over the wharf to the firm land or shore. It is not

questioned that the expense was incurred, and for this purpose. The only question is, upon whom must it fall? This is determined by an examination of the terms of the bill of lading, which contains two clauses which have been insisted upon in the argument as having a bearing upon this issue. It is provided that the marble is "to be delivered from the ship's deck, when the ship's responsibility shall cease;" and a further proviso that the "landing is to be designated by consignees, provided the steamer can approach safely and will lay afloat." This last clause has no reference to the manner of delivery of the cargo, as to where it is to be received by the consignees. It merely gives the consignees the right to select the place of landing, and leaves the vital claim of the contract as to delivery unrestricted and unaffected.

Words cannot have a clearer or more unambiguous meaning than this clause: "To be delivered from the ship's deck, when the ship's responsibility shall cease." There can be no evidence as to custom in such a case. The delivery, and, consequently, the receipt of the goods, was to be from the ship's deck; whatever the appliances were, to be constructed or used, or expenses incurred, to effect the movement of the marble after it left the ship's deck, were intended to be at the cost of the consignees; and, as if to place the stipulation beyond all possible misconception, it is added,—*i. e.*, when the cargo leaves the deck,—the ship's responsibility shall cease; for it can hardly be contended that the ship's expenses should continue after its responsibility had, by the terms of the contract, ceased.

This clause was inserted, most likely, on account of the great weight of the parcels or pieces of marble, and to place upon the consignees the duty of all preparations for carrying the marble beyond the wharves—which are structures insufficient to sustain such weight—as well as all cost of making the transfer.

This item is therefore allowed, and the judgment will be for the libellants for the amount of the first and last items claimed, with costs.

## THE SARATOGA.

(District Court, S. D. New York. November 1, 1881.)

## 1. PENALTIES AND FORFEITURES—ACT OF FEBRUARY 8, 1881.

The word "seizure," used in the act of February 8, 1881, embraces seizures by the marshal under legal process for the enforcement of a penalty pursuant to section 3088 of the Revised Statutes, as well as seizures by revenue officers for the purposes of forfeitures.

In Admiralty.

*S. L. Woodford*, U. S. Att'y, and *W. C. Wallace*, Asst., for libellant.

*Goodrich, Deady & Platt*, for claimants.

*Brown, D. J.* On the fourteenth day of July, 1881, as the steamship *Saratoga*, from Havana to New York, was coming up the bay and passing quarantine, some boxes of cigars, intended to be smuggled, without the knowledge or privity of the master or owner of the vessel, were dropped from the side of the vessel by some persons unknown. The cigars being of the value of over \$400, and having been thus "unladen without a permit," the master of the vessel, by section 2873 of the Revised Statutes, became liable to a penalty of \$400; and, by section 2874, the vessel, her tackle, apparel, etc., became liable to be forfeited to the United States. The cigars were thereafter seized and forfeited to the government. On July 20, 1881, the master was sued for the penalty of \$400, and on July 21st the libel in this suit was filed to enforce the same penalty against the vessel, and she was seized by the marshal under process issued out of this court pursuant to section 3088 of the Revised Statutes.

The owners of the vessel appeared and filed exceptions to the libel, setting forth that the vessel was employed as a common carrier, and claiming that under the provisions of the act of February 8, 1881, the vessel is no longer subject to seizure for penalties in such cases, and asking that the libel be dismissed, as it does not appear that either the master or owners were "a consenting party or privy to the illegal acts." The government, though admitting these facts, claimed that the act of 1881 applies exclusively to cases of forfeiture, and of seizures for the purposes of forfeiture, and not to seizures under process to enforce penalties under section 3088.

The exceptions to the libel in this case are based upon the provisions of the act of congress passed February 8, 1881, which, with its title, is as follows:



"An act to amend the law relative to the seizure and forfeiture of vessels for breach of the revenue laws.

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that no vessel used by any person or corporation, as common carrier, in the transaction of their business as such common carriers, shall be subject to seizure or forfeiture by force of the provisions of title 34 of the Revised Statutes of the United States, unless it shall appear that the owner or master of such vessel, at the time of the alleged illegal act, was a consenting party or privy thereto."

It is admitted that the *Saratoga* was engaged in the business of a common carrier, and that neither the owners nor the master were "a consenting party or privy to the illegal act" for which the penalty was incurred. The single question presented for decision is whether the word "seizure" used in the act of 1881 embraces seizures by the marshal under legal process for the enforcement of a penalty pursuant to section 3088 of the Revised Statutes, or whether it is to be limited exclusively, as claimed on behalf of the United States, to a seizure by revenue officers for the purposes of forfeiture.

Section 3088 of the Revised Statutes, under which the seizure in this case has been made by the marshal, is a part of title 34, and is as follows:

"Whenever a vessel, or the owner or master of a vessel, has become subject to a penalty for a violation of the revenue laws of the United States, such vessel shall be holden for the payment of such penalty and may be *seized* and proceeded against summarily by libel to recover such penalty."

This provision was first enacted as section 8 of the act of July 18, 1866, entitled "An act further to prevent smuggling, and for other purposes," and was incorporated in title 34 of the Revised Statutes, as section 3088, with the change of a few words not affecting the question here presented. The penalty here sought to be enforced was incurred under section 2873, which provides that "if any merchandise shall be unladen or delivered from any vessel contrary to the preceding section, without a permit, the master of such vessel \* \* \* shall be liable to a penalty of \$400;" and by the succeeding section, 2874, it is provided that all merchandise so unladen "shall become forfeited, and may be seized by the officers of the customs; and where the value thereof shall amount to \$400, the vessel, tackle, apparel, and furniture shall be subject to like forfeiture and seizure."

The cigars intended to be smuggled in this case having exceeded the value of \$400, the vessel, under section 2874, would have become liable to "forfeiture and seizure" but for the act of 1881, which, it is conceded, has relieved the vessel from forfeiture, or seizure for the

purposes of forfeiture, under that section. But the penalty of \$400, imposed upon the master by section 2873 for the same occurrence, still remains unaffected by the act of 1881; and for that penalty it is claimed on behalf of the United States that the ship, under section 3088 above cited, may still be held and seized.

The seizure contemplated by section 3088, as held in the case of *The Missouri*, 3 Ben. 508, is a seizure by the marshal under the usual judicial process of the district court of the United States. This is more plainly indicated by the original eighth section of the act of 1866, which contains, at the end of the section as above cited, the additional words, "in any district court of the United States having jurisdiction of the offence," which words are omitted in the Revision.

Title 34, referred to in the act of 1881, relates to the collection of duties upon imports. There are numerous sections of this title whereby penalties may be incurred by the master for violations of the revenue laws, (2772, 2775, 2809, 2814, 2867, 2868, and others,) and for all these penalties the vessel, by section 8 of the act of 1866, now section 3088 of the Revised Statutes, could be held and seized. In the case of *The Missouri*, above quoted, the penalty was incurred by the master, under section 2809, for goods not being on the ship's manifest. There are also several other sections of this title whereby the vessel may become subject to forfeiture, and in all such cases the first step in proceedings for forfeiture must be a seizure by the revenue officers. From this it appears that there are two kinds of seizure of vessels equally provided for by title 34 of the Revised Statutes; the one class, a seizure by the officers of the revenue for the purposes of an entire forfeiture; the other class, a seizure by the marshal under process for the enforcement of some of the various penalties prescribed by that title. And in each alike the vessel was liable to seizure, though the master and owner might be in fact innocent of any offence.

It is under this state of the law that the act of 1881 declares generally and broadly that no vessel, in the cases stated, and unless it shall appear that the owners or master were a consenting party or privy to the illegal acts, shall be subject to seizure or forfeiture by force of the provision of title 34; *i. e.*, by force of any provision of that title. The vessel in this case has been seized; the seizure has been made by force of title 34,—that is, by section 3088, which is a part of that title,—and by no other right or warrant whatsoever. The right of seizure depends wholly upon that section. The case, therefore, falls within the general language of the act of 1881. I think

it clear, also, that it must be held to fall equally within the intent of the act, and that for several reasons:

1. Because the language of the act is plain and unambiguous; and according to the ordinary use and meaning of the words used it embraces this case.

The primary maxim for ascertaining the intent of a statute is to look first of all to the language of the act itself. Unless some contrary intent appears, its words are to be interpreted according to their ordinary use and meaning. In the case of *Maillard v. Lawrence*, 16 How. 251, the court says: "The popular and received import of words furnishes the general rule for the interpretation of public laws." If the language is unambiguous, and its application to the case in hand is apt, reasonable, and natural, the intent to include it ought not to be questioned; the plain sense of the words used is a sufficient evidence, as it is also the highest evidence, of the intent to embrace it.

Vattel, among his first maxims of interpretation, says, (B. 2, c. 17, § 263:)

"It is not permitted to interpret what has no need of interpretation. When an act is conceived in clear and precise terms,—when the sense is manifest and leads to nothing absurd,—there can be no reason to refuse the sense which it naturally presents. To go elsewhere in search of conjectures, in order to restrain or extinguish it, is to endeavor to elude it. If this dangerous method be once admitted, there will be no act which it will not render useless."

In the case of *Newell v. The People*, 7 N. Y. 97, the late circuit judge of this court said:

"Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing we are to seek is the thought which it expresses. To ascertain this the first resort in all cases is to the natural signification of the words employed, in the order and grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then that meaning, apparent upon the face of the instrument, is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument; and neither courts nor legislatures have the right to add to or take away from that meaning."

In *McCluskey v. Cromwell*, 11 N. Y. 601, *Allen, J.*, quoting the passage last cited, also says:

"It is beyond question the duty of courts in construing statutes to give effect to the intent of the law-making power, and to seek for that intent in

every legitimate way. But in the construction both of contracts and statutes, the intent of the framers and parties is to be sought, first of all, in the words and language employed, and if the words are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation, and when the words have a definite and precise meaning to go elsewhere in search of conjecture in order to restrict or extend the meaning. Statutes and contracts should be read and understood according to the natural and most obvious import of the language, without resort to subtle and forced construction for the purpose of either limiting or extending their operation."

Now the language of this act is plain and unambiguous. According to its grammatical construction, and the natural and obvious meaning of the words used, it prohibits every seizure of the kind described by force of any provision of title 34. The seizure in this case is one of the kind described, viz., of a vessel employed as a common carrier, where neither master nor owner was a consenting party or privy to the illegal act, and the seizure is made under title 34 exclusively. The seizure by a marshal for a penalty is as much a "seizure," both in the ordinary meaning of that word and in its legal sense, as a seizure by a revenue officer for the purpose of forfeiture. To seize is to "take hold of suddenly and forcibly; to take possession of by force." Worcester's Dict. In law, seizure is "the act of taking possession by virtue of an *execution or legal authority*." Bouvier's Law Dict. As respects the fact of seizure it matters not by what legal officer, or in what kind of a proceeding, such forcible possession is taken; nor does it make any difference to the owner of the vessel, or to the public who may have taken passage in her, or laden her hold with goods for immediate transportation, whether the seizure and the interruption of her journey come from a revenue officer or a marshal. Whether done by the one or by the other, the act of each, the seizure itself, the forcible taking possession, is precisely the same in both cases.

The word "seizure" applies equally to both. It manifestly describes the one kind as aptly and as naturally as the other. In the act of 1881 there is no indication that the word "seizure" is not used in its general legal as well as popular sense. There is no evidence in the act itself of any intention to limit its application to seizures by one class of officers and in one kind of proceedings, and to exclude other seizures in other proceedings under title 34. No such distinction is made. Moreover, in passing this act, congress must be presumed to have been aware of the two different proceedings and modes of seizure

provided for by title 34, to which this act expressly refers; and in using language equally applicable to both without distinction, it must necessarily be presumed to have intended to include both. Nor can it be held that because there are two different proceedings in which a seizure by different officers may be made under title 34, there is, therefore, any ambiguity in the use of the word "seizure," or in its application. It might as well be claimed that ambiguity arises from the fact that there are numerous forfeitures and numerous penalties under various different sections of title 34, under which seizure or forfeiture might be had. The statute is expressly made to apply, not merely to a part, but to all cases arising under title 34. In truth, it is not any ambiguity in the word "seizure" itself that the libellant seeks to establish, but rather a restriction and a limitation of the statute of 1881, by implication—an exclusion of the application of the statute to one of the classes of cases in which a "seizure" is confessedly made; *i. e.*, to all cases of seizure under section 3088. But as this section is among "the provisions of title 34," the statute of 1881 itself declares its application thereto; and to exclude that section from its operation by implication or "construction" would, in my judgment, be to nullify the act to that extent.

2. Again, the act of 1881 is manifestly a statute for the relief of innocent owners, and the equity and general purpose of the act apply as plainly to relief from penalties as to relief from forfeitures. There are many penalties enacted under title 34 for acts which could only be done with the full knowledge of the master. The vessel remains liable for all penalties imposed for such acts precisely as before. It is different with clandestine smuggling on the great lines of travel. In these cases the vessel, by sections 2867, 2868, 2873, 3088, might be held and seized either for penalties or for forfeitures for acts which the owners and master were powerless to prevent.

In cases of seizure for forfeiture, moreover, when the innocence of owners and master subsequently appeared, a release was a matter of course; but the temporary private vexation and public inconvenience arising from the interruptions of traffic and travel through such seizures, which sometimes happened at the moment of departure, were palpable hardships. The same annoyances and public inconveniences are liable to arise upon a seizure for penalties; and in prohibiting *all* seizures of vessels where owners and master are innocent, congress may have designed, not merely to relieve innocent ship-owners themselves, but also to avoid the public inconve-

niences arising from any unnecessary seizure and detention of vessels engaged upon the great highways of commerce and travel.

It is urged on the part of the libellant that it "does not seem reasonable and just to relieve the ship from the burden of the lien, and leave her master still liable for the penalties." But the penalties to which masters, though innocent, are made liable in the cases of smuggling are based upon necessary grounds of public policy, as *Story, J.*, has pointed out in the cases of *The Schooner Harmony*, 1 Gall. 128, and *The Schooner Industry*, 1 Gall. 114, to prevent collusion on the part of masters, and to insure vigilant watchfulness and integrity in the prompt interdiction of illegal traffic. These penalties have remained substantially the same through nearly the entire history of the government. Act March 2, 1799. But it was not until the act of July 18, 1866, so far as I can ascertain, that the ship also could be held for these penalties, or seized for their recovery. The liability of the master remains precisely as it has ever been since the act of March 2, 1799, resting upon the grounds of public necessity. Prior to 1866 the master's liability for all these penalties was deemed sufficient. The act of 1881, in relieving a common-carrier ship from liability for acts of which master and owners are innocent, as, in my judgment, it does, simply places the government in the same position in regard to penalties for such acts, and leaves it with the same rights and remedies, therefore, that it had held for 67 years prior to the act of 1866.

Congress might well consider that the old penalties to which masters still remain liable are sufficient to insure good faith and all that public policy demands, where it does not appear that either the owners or master were a consenting party or privy to the illegal acts; and that the additional liability of the vessel to seizure first imposed by the act of 1866, with the public or private inconveniences incident thereto in the case of innocent common carriers, shall not be longer imposed. And such, I think, was its intent.

3. Had it been intended by congress to give relief in cases of forfeiture only, the words "seizure or" in the act of 1881 would have been unnecessary. The word "forfeiture" alone would have been sufficient. There can be no seizure by revenue officers except where forfeiture is declared by statute. *The Missouri*, 3 Ben. 508. Seizure by them is merely the first step in proceedings for forfeiture, and whenever forfeiture is declared it is their duty to make seizure for that purpose. But if forfeiture is forbidden there can be no seizure

for the purposes of forfeiture. Hence the word "seizure," in the act of 1881, would be reduced to mere surplusage upon the construction contended for by the libellants, thus violating another maxim of interpretation that effect shall, if possible, be given to all the words of the statute. *U. S. v. Bassett*, 2 Story, 389.

The application of this maxim is the more imperative when, as in this case, both the words "seizure" and "forfeiture" have a natural and exact application to both the classes of cases found in title 34, to which the statute refers, viz.: the one to cases of strict forfeiture; the other to seizure, under section 3088, for penalties without forfeiture.

4. That such was the particular and special intent of congress in the act of 1881 is strongly sustained by a consideration of the analogous section of the Revised Statutes (3063) relating to vehicles used on land in transporting smuggled goods. By section 3062 any such vehicle or team is declared liable to "seizure and forfeiture;" but section 3063 declares that—

"No railway car or engine, or other vehicle, or team used by any person or corporation, as common carriers, \* \* \* shall be subject to *forfeiture* by force of the provisions of this title, (34,) unless it shall appear that the owner, superintendent, or agent of the owner in charge thereof \* \* \* was a consenting party or privy to such illegal importation or transportation."

This provision was originally a part of section 3 of the act of July 18, 1866, above referred to. The act of February 8, 1881, is manifestly modelled upon that section. Its language is almost identical, and could not have been framed except with the former act in view. Yet section 3063, relating to railway cars and other vehicles, it will be noticed, prohibits "forfeiture" only, though section 3062 provides for "seizure and forfeiture;" but as there can be no seizure by revenue officers for the purposes of forfeiture, if forfeiture itself is forbidden, there was no need in the prohibitory section relating to railway cars and other vehicles to use the word "seizure," since there was *no other existing legal liability* of land carriages to "seizure," except for the purposes of forfeiture under section 3062. The prohibition of "forfeiture" in the prohibitory section (3063) necessarily included a prohibition of seizure for the purposes of forfeiture; and, accordingly, we do not find the word "seizure" there used, as it was not necessary.

But, in the case of vessels, there is an additional liability to "seizure" for penalties, without forfeiture, which does not exist as regards land vehicles, and which would not be covered by the use of the word

"forfeiture" alone. The insertion of the additional words "seizure or," in the act of February 8, 1881, must, therefore, be held to have been intended to meet these additional cases of seizure under section 3088, which would not have been covered by the use of the word "forfeiture" only, since seizures, under that section, are the only cases for which the use of that word would be necessary.

5. If any doubt could still exist as to the intention of congress, it would be removed by a recurrence to the history of the act itself, as exhibited in the journals of congress, and to the times in which it was passed, to which, in cases of doubt, the supreme court have held that reference may be made. *Blake v. Nat. Bank*, 23 Wall. 307; *U. S. v. U. P. R. R.* 91 U. S. 74.

That complaints had long been made of the hardship of enforcing these penalties and forfeitures by the seizure of vessels of innocent owners is well known. A memorial numerously signed was addressed to congress in 1879, asking relief by the passage of an act therein proposed in the precise language of the statute of February 8, 1881, as finally passed. It was introduced into the senate on January 6, 1880, and, after reference to the finance committee, (Cong. Rec. vol. 10, pt. 1, p. 194,) was reported by them as bill 939, to which the memorial is attached, (Cong. Rec. vol. 10, pt. 1, p. 778;) was passed without amendment on March 8th, (Cong. Rec. vol. 10, pt. 2, p. 1365,) and sent to the house of representatives. It was there referred to the committee on ways and means, (Cong. Rec. vol. 10, pt. 2, p. 1633,) who, on May 24, 1880, reported it with a recommendation of an amendment striking out the words "seizure or," whence it was referred to the committee of the whole. Cong. Rec. vol. 10, pt. 4, p. 3781. As thus modified it would have corresponded exactly to the section of the Revised Statutes (3063) relating to land carriages, and would not have covered the special liability of vessels to seizure for penalties only under section 3088.

The memorial, however, while making reference to the numerous sections of the Revised Statutes imposing penalties and forfeitures on vessels, called attention to forfeitures under section 2874, and complained particularly of section 3088 as "giving a lien on the vessel, which may be *seized* therefor." It is plain, therefore, that the amendment proposed by the committee of ways and means, to strike out the words "seizure or," and leaving cases of forfeiture only provided for, did not cover the ground desired by the memorialists. The report of that committee was disagreed to, and some nine months afterwards,



on February 7, 1881, on further recommendation of the committee withdrawing the proposed amendment, the bill was passed without amendment as originally prepared. Cong. Rec. vol. 11, pt. 2, p. 1521.

From this history of the progress of the bill to its passage it seems to me impossible to doubt that the words "seizure or" were not inserted as mere surplusage, or as a superfluous reference to the seizure which necessarily precedes a forfeiture; but that they were inserted *ex industria* for the very purpose of covering the liability of vessels to seizure for penalties under section 3088, as well as for forfeiture under other sections. It is at the same time a good illustration of the soundness of the legal maxim of interpretation above referred to, which requires that full effect shall be given to all the words of a statute or other written instruments, whenever there is subject-matter to which they may aptly refer.

It is urged by the libellant that the effect of the interpretation thus given to the act of 1881 will be to destroy the *lien* for penalties given by that act, and that if it had been the intention of congress to abolish that lien it would have been done by the use of other and more appropriate language than merely prohibiting "seizure." I do not perceive the force of this argument. Section 3088 does not use the word "lien." It provides that the vessel may be "held, seized, and proceeded against summarily by libel." Congress, in designing to exclude from this liability the vessels of innocent owners, might doubtless have declared that such vessel should not be "held, seized, or proceeded against by libel." But it is obvious, I think, that such amplification of prohibitory language is unnecessary as well as unusual. In enacting the prohibition, the use of either of the three important words in section 3088, either "holding," or "seizing," or "libelling," would have been sufficient. The word chosen in the act is the most significant of the three, the one which is most familiar and comprehensive, and which strikes most obviously at the root of the particular evil complained of, viz., the seizure of the vessel.

In support of the libellant's contention that only cases of forfeiture and of seizure for the purposes of forfeiture are intended by the act of 1881, it is urged that the words "seizure and forfeiture," in revenue law, have acquired a technical signification referring to the entire proceeding for the condemnation of forfeited property, in which proceeding seizure by the revenue officers is the first step; that the word "seizure," whenever used in title 34, means a seizure by reve-

nue officers for the purposes of forfeiture, save only in section 3088; and that the word "seizure" in the act of 1881 should, therefore, be interpreted according to this technical use, and according to its most common meaning in title 34. The title of this act, wherein the words "seizure and forfeiture" are conjoined, is also referred to in support of this view.

But it is well settled that the language of the title of an act is of little value, and cannot control the meaning of the body of the act. *Haddon v. The Collector*, 5 Wall. 105-110. The title of this act does present a case of possible ambiguity, because its grammatical reading will apply equally well to all cases of either seizure or forfeiture, disjunctively, or to the case of a technical "seizure and forfeiture" only. But in the body of the act, which is always controlling, there is no such ambiguity. Its language is not "seizure and forfeiture," but "seizure or forfeiture;" and the whole structure and reading of the act shows that these words were not there used in the technical manner contended for. And in the great majority of instances where "forfeitures" are enacted by title 34, the word "seizure" is not used in conjunction with it. Nor can I regard the argument, derived from the fact that the word "seizure" is used to signify a seizure for penalties in only *one* section of title 34, as of any force, when the very language of the act of 1881 is such as to make it applicable to every section of title 34. But, in fact, section 3088, through its relation to all penalties imposed upon masters, carries with it, a reference to a much larger number of the sections of title 34 than those which refer to the technical cases of seizure and forfeiture only, as the latter sections are much less in number than those imposing penalties upon masters. Such criticisms, however, are of little value, and have no weight against the general and comprehensive language of a statute which affords relief in terms as naturally and justly applicable to the one class of cases as to the other.

Considering, therefore, the plain and comprehensive language of this act, the equity of the statute, and the general relief it was manifestly designed to afford, the analogous statute of relief in regard to land vehicles, and the insertion of the additional word "seizure" in the act of 1881, which would be requisite for no other cases than those of penalties; and considering the various steps in the passage of this act which forbid the supposition of the insertion of any unessential words,—I am of opinion that the act was designed to embrace seizures for penalties under section 3088, as well as for forfeitures.

A different opinion as to the application of this statute having been expressed by the attorney general, (April 28, 1881,) I have given the matter more careful consideration, and stated at greater length than I might otherwise have done the reasons that have constrained me to come to the conclusion I have reached.

The exceptions to the libel are, therefore, sustained.

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THE PRINCE LEOPOLD.\*

(Circuit Court, E. D. Louisiana. 1881.)

1. TOWAGE SERVICES—LIENS.

Towage service must be rendered to carry a lien; an unexecuted contract to perform towage service is not enough.

In Admiralty.

*I. R. Beckwith*, for libellant.

*Emmet D. Craig*, for claimants.

PARDEE, C. J. An unexecuted contract of affreightment gives no maritime lien. 18 How. 188; 19 How. 90. An unexecuted contract for furnishing supplies carries no lien. *The Cabarga*, 3 Blatchf. 75. An unexecuted contract for wages, where the voyage was never begun and no services rendered, furnishes no lien. 1 W. Rob. 89, cited in 19 How. 90. Admiralty and maritime liens are not given by implication. 19 How. 89. No reason is given why an unexecuted contract to furnish towage to a vessel should stand on any better footing than though the contract related to freight, wages, or materials. It is claimed that towage is a part of the voyage, (22 How. 244;) but that must be understood as towage actually furnished. The owners may have contracts with a dozen different tow-boats that each shall tow the ship, but it is only the ones actually towing the vessel that help begin or complete the voyage.

Let there be a decree maintaining the exception filed, and dismissing the libel, with costs.

\*Reported by Joseph P. Horner, Esq., of the New Orleans bar.

## THE GOLDEN RULE.\*

(Circuit Court, E. D. Louisiana. November 18, 1881.)

## 1. CONTRACTS—EVIDENCE.

Parol evidence is inadmissible to vary the terms of a written contract.

## 2. COMMON CARRIER—DELAY IN DELIVERY—DAMAGES.

In the ordinary case of delay by a common carrier in delivering goods, the measure of damages is the difference in their market value at the time when actually delivered and when they should have been delivered.

In Admiralty.

*I. R. Beckwith* and *E. D. Craig*, for libellant.

*B. Egan*, for claimants.

PARDUE, C. J. This is a suit brought on a bill of lading to recover damages for the failure to deliver in time the goods shipped. The first question is as to whether the defendants had the right to disregard the bill of lading because of representations said to have been made by the drayman who delivered the goods to the steam-boat, to the steam-boat clerk, following which the goods were stowed as through freight for New Orleans, and not as way freight; so that when the proper landing was reached the goods could not be landed without great trouble and delay. The goods were, therefore, not landed on the down trip of the boat, but were landed on the return trip, causing a delay of about eight days. Such a defence cannot be listened to, as otherwise every bill of lading could be altered or varied by the recollections of a steam-boat mate, or the interference of disinterested parties. The carrying contract, reduced to writing in a bill of lading, can no more be altered or varied by parol evidence than any other written contract. See *The Delaware*, 14 Wall. 579. But, outside of this, unauthorized parties certainly cannot change the contract between the ship and the shipper.

The other question is as to the rule of damages. The freight shipped was about 140 wheelbarrows, and the libellant claims that, at the place of landing, he had a contract or job to repair or build a levee, with 125 men in waiting to use the wheelbarrows; and that during the delay the men could not work; and that libellant was compelled to keep and support the men at an expense of \$1.25 each per day, thereby being damaged to that extent by the negligent failure of the defendant boat to deliver the freight in time. A statement of libellant's claim seems to decide it against him, particularly as there is no showing whatever that the defendant boat was in anywise

\*Reported by Joseph P. Horner, Esq., of the New Orleans bar.

advised of the circumstances rendering the delivery of the wheelbarrows a matter of urgency. These damages claimed are consequential. Without notice of urgency and special contract the measure of damages, for delay in delivery of goods shipped by a common carrier, is the difference in the market value at the time of the delivery and the time when the goods should have been delivered. See Desty, Adm. § 256. As to any such difference in value there is no evidence.

The libel was properly dismissed in the district court, and the same decree will be entered in this court.

### THE SYLVAN GLEN, etc.

(District Court, E. D. New York. October 4, 1881.)

#### 1. ADMIRALTY — ACTS CAUSING DEATH — ACTION IN REM FOR DAMAGES — LIEN UNDER THE STATUTE OF NEW YORK.

A row-boat containing two men and a woman, which was crossing the East river at New York just at dusk, was struck and capsized by a steam-boat of a regular line plying to Harlem, and while the men were saved the woman was drowned. An action *in rem* for damages being brought by the husband of the deceased woman as administrator, *held*, that the statute of the state of New York created no maritime lien for such damages, and no right of action to the libellant arose therefrom.

W. W. Goodrich, for libellant.

R. D. Benedict, for claimant.

BENEDICT, D. J. This action is brought by John Welsh, administrator of Margaret Welsh, deceased, to recover, for the benefit of himself and the next of kin of Margaret Welsh, the damages sustained by him and such next of kin by reason of the death of said Margaret Welsh, which death, it is averred, was caused by the negligence of those in charge of the steam-boat *Sylvan Glen*, in running over a small boat wherein the deceased was being transported upon the East river.

It is supposed by the libellant that the determination of the case depends upon the question of fact whether the death in question was caused by negligence on the part of those navigating the steam-boat; but there lies at the threshold of the case a question of law, which, as I view it, is decisive of the controversy. The right of action set up in the libel is derived from a statute of the state of New York which provides that—

"Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or

the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured." Act of December 13, 1847, as amended by act of April 7, 1849, and act of March 16, 1870.

This statute does not provide for the survival of any right of action belonging to the deceased. It creates a liability where none before existed. It makes a new cause of action, namely, the death, and it declares who shall be liable to such action, and by whom, as well as for whose benefit, the action may be maintained. It is not doubted that the right created by this statute of the state may be enforced, in a proper case, by the courts of the United States; nor that it may be enforced in the admiralty, when a marine tort is the foundation of the right. These propositions have not been controverted here, but they by no means afford ground on which to maintain this action; for this is an action *in rem*, and, if maintainable at all, must rest upon the proposition that the libellant, by virtue of this statute of the state, has a maritime lien upon the vessel proceeded against for the damages resulting to the husband and next of kin of Margaret Welsh from the death of that person. No ground has been suggested upon which such a proposition can be maintained. The words of the statute are, "the person who or the corporation which." Those words create no lien, much less a maritime lien; and, if they did, how can it be held that a state has the power to create a maritime lien for the benefit of this husband and next of kin? It is true that it is held by the supreme court of the United States that a lien, created by a state statute, for supplies and repairs to a domestic vessel, may be enforced by admiralty proceedings in the courts of the United States. But the rule in the class of cases referred to is peculiar. It is conceded by the court to be anomalous, and its basis upon any sound principle doubted, (*The Lottawanna*, 21 Wall. 581,) and I know of no expressions of that court that will warrant the belief that any extension of such an anomaly would be approved. Besides, in this instance, the state statute creates no lien at all. It is not seen, therefore, how in any aspect the statute upon which the libellant relies can afford a right of action against this vessel.

The case of *The Highland Light*, Chase, Dec. 155, affords authority adverse to the libellant, while the case of *The Garland*, 5 Fed. Rep. 924, cannot be deemed an authority in favor of his action, for the reason that the point in question does not appear to have received attention in that case.

The libel must be dismissed, and with costs.

O'NEIL v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RY. CO.

(Circuit Court, E. D. Missouri. November 2, 1881.)

1. PRACTICE—DEMURRER TO EVIDENCE.

If there is conflicting evidence on which the jury should pass, the court cannot draw to itself the decision of what the evidence or the weight of evidence establishes.

2. MASTER AND SERVANT—NEGLIGENCE.

An employer who introduces, without notice to his employe, new and unusual machinery, whether belonging to himself or another, involving an unexpected or unanticipated danger, through the introduction of which the employe, while using the care and diligence incident to his employment, meets with an accident, is liable in damages.

3. SAME—SAME—PLEADING.

Where an accident occurs to a railroad employe in consequence of the introduction of a foreign and defectively-constructed car into the train on which he is employed, and he sues the railroad company for damages, he is not bound to allege in his petition that the accident was caused by the introduction of a foreign car.

The plaintiff avers in his petition that, at the time of the accident therein referred to, he was a brakeman in the employment of defendant; that while, in the performance of his duties as such, he was coupling a car, used and operated by defendant at the time, to a certain engine of the defendant, his hand and arm were caught between the car and engine, and crushed and lacerated so that it was necessary to amputate it between the elbow and wrist, and that it was amputated; that said injuries were caused by the defective, unsuitable, and dangerous apparatus and appliances for coupling said engine and car together; that the dead-woods on said car and engine were insufficient and unstable, and dangerous to plaintiff whilst coupling, by reason of their not keeping said car and engine apart and allowing the draw-heads of the engine and car to interlap, thereby catching and crushing plaintiff's arm and hand as aforesaid; that plaintiff was ignorant of the dangerous condition of the appliances for coupling said engine and car together, and that neither defendant nor its agents informed him thereof; and that his injuries were caused by the negligence of defendant in supplying him with unsuitable, defective, and dangerous appliances with which to work in the discharge of his duty, and without any negligence on his part.

The case came on for trial October 13, 1881. It was tried before a jury, *Treat D. J.*, presiding. The testimony of witnesses produced on behalf of the plaintiff tended to prove the allegations of the peti-

tion. The defendant proved that the car in question did not belong to it, but was a foreign car. At the close of the evidence defendant asked the court to instruct the jury that, under the evidence and pleadings in the case, plaintiff could not recover; but the instruction was refused.

TREAT, D. J., thereupon charged the jury as follows:

*Gentlemen of the jury:* It is proper, in the consideration of this case, that you should bear in mind the difference in law between the obligations of an employer to an employe, and the obligations of a railroad to a stranger. In the latter case the utmost degree of diligence is required—extraordinary diligence. The case before you involves a few propositions of law in the light of which you should consider the testimony; these propositions being, in the first place, that an employe who undertakes work, though the same may be of a dangerous character, is supposed to be competent to the discharge of that duty, assuming for himself all ordinary risks connected therewith; *second*, that the employer, to-wit, the railroad company, as in this case, must furnish him with reasonably and adequately safe appliances for the performance of his duties. Railroads, as in the case before you, are bound to receive cars from other roads, to handle them, and to haul them, and a brakeman or other employe of the defendant road is supposed to know that cars of different construction, and, possibly, of different modes of coupling, will be used in the conduct of the business of the railroad company; and the brakeman or other employe, though those cars coming onto the road may be more or less dangerous than the ordinary cars, is supposed to be competent to attend to his business, notwithstanding such cars are used. In other words, this is not a question of comparison between freight cars of the Iron Mountain Railroad, owned by itself, and other cars that it may haul over its road in connection with its respective trains. Behind that rests the main inquiry: Did this defendant road—no matter whether the car was a foreign car—put into its train a car which was not reasonably and adequately safe for the purpose for which it was used, in connection with the duties which the servants had to perform? In other words, though there might be differences in the construction of foreign cars, as compared with the cars belonging to the Iron Mountain Railroad itself; though there might be different degrees of danger connected with the handling of the different cars; yet this defendant was bound that no car, whether its own or a foreign car, should be otherwise than reasonably and adequately safe for its employes to handle and to manage in the ordinary conduct of their business. Consequently the strain in this case seems to be this: Was this car of which you have heard not adequately safe to be put into the train, whereby an employe,—a brakeman, for instance,—in undertaking to make the coupling, could not, by the exercise of ordinary care and skill on his part, escape accident? Of course, every one engaging in a particular business, employed therefor, is presumed—is bound in law—at his own hazard to exercise ordinary care and diligence with respect to the employment in which he is engaged. He is presumed to be competent therefor; yet, on the other hand, his employer—as a railroad, for instance—is bound on its part to furnish him with reasonably safe and adequate appliances, whereby, in the exercise of



ordinary care, he would not encounter accidents of the nature described to you. The case, then, may be narrowed down to this: the plaintiff is entitled to recover, if, exercising ordinary care and diligence in the nature of the employment in which he was engaged, he, through the unreasonably inadequate and unsafe character of the car mentioned, incurred this accident.

If, through this neglect of the defendant company in furnishing such inadequately safe contrivances, without any negligence on his part, he incurred this danger, he is entitled to recover, and the measure of his compensation will be such as in your judgment he ought to receive in consequence of the injury, taking into consideration the nature and extent thereof, where there are no other special damages alleged in the case. On the other hand, if the damage was caused simply by his own negligence or failure to exercise ordinary care in the employment, the nature of which has been described, he cannot recover. If I have made myself understood, this company had the right to haul over its road cars not belonging to it—foreign cars, as they are called. These cars might differ in construction, and might differ in the degree of danger attending their handling or management; yet, if the accident occurs from their being not reasonably safe or adequate, under any circumstances, for the business for which they are employed, and the accident occurs without the negligence of the employee, the company must respond thereto. If, on the other hand, the employee, through his own negligence, meets with an accident growing out of his handling or attempting to handle cars that are reasonably and adequately safe, then the accident is at his own cost, for which there would be no redress. Determine then, gentlemen,—*First*, was this car reasonably and adequately safe for the employees in the handling of the same. If not, did the plaintiff, through carelessness or negligence, contribute to the accident which he sustained? If the car was not adequately safe, and he was not negligent in performing the duty assigned him, he is entitled to recover. If, on the other hand, the car was adequately safe, and the accident occurred to him through his failure to exercise the proper degree of care in the work in which he was employed, he cannot recover. It is a compound question always, gentlemen,—*First*, the neglect of the defendant; *secondly*, the contributory neglect of the plaintiff. Of course, it devolves on the defendant, in cases of this character, if the plaintiff has made out that the car was not adequately safe in respect of the management thereof—I say, it is the duty of the defendant to show that plaintiff's negligence contributed to the accident.

The jury brought in a verdict for the plaintiff. The defendant made a motion for a new trial, and in arrest of judgment, upon which the following opinion was delivered:

*T. S. Rudd and A. R. Taylor*, for plaintiff.

*Thoroughman & Pike*, for defendant.

TREAT, D. J. The plaintiff sued the defendant for damages caused by the alleged negligence of the defendant. A trial was had, and verdict rendered for plaintiff. The defendant has filed motions for new trial and in arrest. The plaintiff was an employe of the defendant, and the accident occurred while he was engaged in the scope of

his employment, viz., as brakeman, in coupling cars on a freight train. The evidence at the trial was conflicting. It seems that the defendant railway, in the discharge of its duties, was accustomed to receive, couple, and haul on its trains cars belonging to other railroads whose bumpers or dead-woods and coupling appliances were different from its own; but that "a foreign car" of the P. R. R., of peculiar construction as to its dead-wood and couplings, was seldom received and placed in defendant's trains. "Foreign cars," sent forward by the P. R. R. road, differing from defendant's cars, yet differing from those of the P. R. R., were frequently hauled over the defendant road as part of the latter's trains. It was evident from the testimony that different degrees of danger to operatives existed when one or the other of such foreign cars was used, and the testimony was in conflict as to which the foreign car was, which was introduced into the train in question.

At the close of the evidence defendant demurred, on the ground that the case, as fully presented, did not establish plaintiff's right to recover. It is admitted that, even at the close of evidence offered on both sides, the court can instruct the jury that the plaintiff cannot recover; yet if there is conflicting evidence on which the jury should pass, the court cannot draw to itself the decision of what the evidence or the weight of evidence establishes. If this were not so the court would usurp the province of the jury.

It is contended in arrest that while the petition sets out with particularity the circumstances under which the accident occurred, it failed to state that the car in question was a "foreign car." The averment is that "while plaintiff, etc., was coupling a *certain* car, used," etc., the accident happened "through the negligence of the defendant in supplying to plaintiff said car, defectively and improperly constructed, and in failing to inform plaintiff of the improper construction of said car; that said car was constructed in an unusual and improper manner, in that the dead-woods extended out too far, so as to render the work of coupling the engine to said car extremely dangerous," etc. The petition further alleges the unusually dangerous condition of the train from placing therein such a car without notice to the employe, etc.

If this court accepts as a rule of pleading the views expressed in *Leduke v. St. Louis & Iron Mountain R. Co.* 4 Mo. App. 491, still this case would not fall within its purview. The plaintiff was not bound to aver that the accident was caused by the introduction of a "foreign car" into the train; and still further, if such a fact became material

on the trial of the cause, the rules as to variance would have prevailed, and the doctrine of jeofails after verdict.

The law as to employer and employe in such cases, laid down by this court at the trial, was the same as declared by the United States supreme court, and was given in the precise language of that court; yet to avoid misapprehension by the jury, the doctrines stated by Judge Cooley in *Mich. Cent. R. Co. v. Smithson*, 7 N. W. Rep. 791, were repeated and amplified. Still it is contended that, in the light of the rulings in *Porter v. Hannibal & St. Joe Railroad*, 71 Mo. 68, this court omitted to charge that the plaintiff was entitled to recover if he could not have known of the danger by the exercise of proper care, however defective the appliances may have been. A careful examination of the latter case shows that it contains only well-established doctrines, which, if applied to this case, would lead to the same result already reached.

It is of great importance to hold employes on railroad trains to the fullest measure of duty, for on their skill and fidelity life and property depend; and it is equally important for their protection that their employers shall furnish them with reasonably adequate and safe appliances whereby they can perform their duties with safety to themselves and to the lives and property at stake. To relax the rules so that the employer may escape liability, would be as detrimental to public interests as if the rules by which the employe is to be governed were to be relaxed in favor of the latter. An employe, as charged in this case, must be supposed to know the nature of the employment, and to possess the skill and diligence requisite for the proper discharge of his duties. He takes the hazard of the employment. Still, if the employer introduces, without notice to the employe, some new and unusual machinery involving an unexpected or unanticipated danger, through the introduction of which the employe, while using the care and diligence incident to his employment, meets with an accident like that in question, it is not unreasonable to hold that the employer should answer therefor in damages.

Both motions are overruled.

#### NOTE.

MASTER'S LIABILITY TO SERVANT—GENERAL RULE. That a servant cannot hold his master responsible for injuries resulting from the negligence of fellow-servants, because this is a risk he has assumed, has remained the rule of law in England ever since the case of *Priestley v. Fowler*, 3 Mees. & W. 1; and the leading case of *Farwell v. Boston, etc., R. Co.* 4 Met. 49, announcing the same rule, has been followed without dissent in this country. But the

responsibility of one person to another, for the consequence of personal negligence, is not lessened by the existence of the relation of master and servant. Said *McCrary*, C. J., in the late case of *McMahon v. Henning*, 3 FED. REP. 353, arising upon facts like those of the principal case: "The true doctrine of the common law is that the master is liable to his servants, as much as to any one else, for the consequences of *his own* negligence; and it is no defence for him to show that the negligence of a fellow-servant contributed to bringing about the injury." Such personal negligence of the master may consist, either in the failure to employ fit and competent servants, or to furnish suitable and safe machinery, structures, appliances, and materials for their use.

**MASTER'S DUTY IN SELECTION OF MACHINERY.** In the selection of machinery, etc., it is the duty of the master to use reasonable or ordinary care, and this care he must exercise, both in procuring and maintaining sound and safe structures and appliances. If he knows, or in the exercise of due care might have known, that they are unsafe or insufficient, either at the time of procuring them or at any subsequent time, he fails in his duty. *Gilman v. Eastern R. Co.* 13 Allen, 440; *Bartonskill Coal Co. v. Reid*, 3 Macq. 266; *Noyes v. Smith*, 28 Vt. 59; *Sullivan v. Louisville Bridge Co.* 9 Bush. 81; *Kansas, etc., R. Co. v. Little*, 19 Kan. 269; *Lewis v. St. Louis, etc., R. Co.* 59 Mo. 495; *Mad River R. Co. v. Barber*, 5 Ohio St. 541. The master is equally chargeable, whether the negligence was in originally failing to provide or in afterwards failing to keep the machinery in safe condition. *Ford v. Fitchburg R. Co.* 110 Mass. 240; *Shanny v. Androscoggin Mills*, 66 Me. 420; *O'Donnell v. Allegheny, etc., R. Co.* 59 Pa. St. 239; *Chicago, etc., R. Co. v. Swett*, 45 Ill. 197; *Cooper v. Central, etc., R. Co.* 44 Iowa, 134.

**"ORDINARY CARE" — WARRANTY OF SOUNDNESS — BEST AND SAFEST MACHINERY.** What will be ordinary care depends on the nature of the business, its extent, degree of hazard involved, and all the circumstances of the case. Said *Thomas, J.*, in *Cayzer v. Taylor*, 10 Gray, at page 280: "What is ordinary care cannot be determined abstractly. It has relation to and must be measured by the work or thing done, and the instrumentalities used, and their capacity for evil as well as good. What would be ordinary care in one case may be gross negligence in another. We look to the work, its difficulties, dangers, and responsibilities, and then say, what would and should a reasonable and prudent man do in such an exigency?"

The law does not exact from the master the exercise of the highest degree of diligence in supplying safe machinery for the use of the servant; ordinary care is sufficient. *Cooper v. Central, etc., R. Co.* 44 Iowa, 134; *Nolan v. Shickle*, 3 Mo. App. at page 307; *Paterson v. Wallace*, 1 Macq. 748; *Holden v. Fitchburg R. Co.* 129 Mass. at page 277. But see *Toledo, etc., R. Co. v. Conroy*, 68 Ill. 560, holding a railroad corporation bound to exercise the highest degree of care in the construction of its road and bridges, and that ordinary prudence in such case was not sufficient.

There is no implied *warranty* in the contract of service that the machinery or materials furnished shall be sound or fit for service, nor that the servant shall not be exposed to extraordinary risks. *Heyer v. Salisbury*, 7 Bradw. (Ill. App.) 93. The master does not guarantee the soundness of the machinery, nor insure the servant against accidents, and if the latter suffers injury from latent

defects unknown to the master and not discoverable in the exercise of ordinary diligence, the master is not responsible. *Fifield v. Northern R. Co.* 42 N. H. 225; *Ormond v. Holland*, El. Bl. & El. 102; *L. R. & F. S. Ry. Co. v. Duffey*, 35 Ark. 602; *Galveston, etc. R. Co. v. Delahunty*, 53 Tex. 206; *Flynn v. Beebe*, 98 Mass. 575; *Ladd v. New Bedford R. Co.* 119 Mass. 412; *Gibson v. Pacific R. Co.* 46 Mo. 163.

The master is not bound to use only the safest and best machinery. That is, aside from the legal effect of the servant's knowledge of the risk, it is not negligence *per se* in the master to continue the use of machinery or materials known by him to be less safe than other machinery or materials he might use for the same purpose. Thus, in *Wonder v. Baltimore, etc., R. Co.* 32 Md. 411, where it was shown that the plaintiff, a brakeman, would not have been injured had a certain improved brake been used, the court said: "A master is not bound to change his machinery in order to apply every new invention or supposed improvement in appliances, and he may even have in use a machine or an appliance for its operation shown to be less safe than another in general use, without being liable to his servants for the consequences of the use of it." *Michigan C. R. Co. v. Smithson*, 7 N. W. Rep. 791; *Hayden v. Smithville Manuf'g Co.* 29 Conn. 548; *Fort Wayne, etc., R. Co. v. Gildersleeve*, 33 Mich. 133; *Smith v. St. Louis, etc., R. Co.* 69 Mo. 32; *Cooper v. Central R. Co.* 44 Iowa, 134. On the other hand, it was held in *St. Louis, etc., R. Co. v. Valirius*, 56 Ind. 511, that it was negligence in a railway company to use cars dangerous in construction when it could procure others not dangerous, and that it must procure the best or be held responsible. See, also, *Dorsey v. Phillips & Colby Construction Co.* 42 Wis. 583, at page 597; *Toledo, etc. R. Co. v. Asbury*, 84 Ill. 429.

**DELEGATION OF MASTER'S DUTY TO AGENT OR SERVANT—SERVANT'S NEGLIGENCE IMPUTABLE TO THE MASTER.** Where an employer attends personally to the supply and repair of the machinery, the question for the jury is, did he exercise reasonable care in the performance of his duty to the servant to select sound and suitable machinery, and to keep the same in repair? When the employer does not do this in person, but, as is often the case with individuals, and always the case with corporations, delegates the duty of selecting and repairing the machinery to his agent or servant, what is the question for the jury in this case? Does the question become, as maintained by some text writers, did the master exercise reasonable care in the selection of the *servant* to whom he delegated the duty of selecting and repairing the machinery? Said Lord Cairns, in *Wilson v. Merry*, L. R. 1 Sc. App. 326: "But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master." If such is the true rule of law, then corporations could seldom be held responsible for injuries to employes from defective machinery; and, in the language of *Byles, J.*, in *Clarke v. Holmes*, 7 H. & N. 937, "the more a master neglects his business and abandons it to others the less will he be liable."

Does not the question for the jury remain the same, whether the master attends personally to the supply and repair of machinery or appoints others to do it? Did he exercise due care in supplying the *machinery*? It is well settled that the duty of the master to use due care in the selection of competent servants is not *necessarily* discharged by the appointment of a competent agent to select the servants, and it is difficult to see why the same rule does not apply in the selection of machinery. *Flike v. Boston, etc., R. Co.* 53 N. Y. 549, *Church, C. J.*, at page 553; *Quincy Mining Co. v. Kitts*, 42 Mich. 34. It may be due care on the part of the master to delegate the duty of attending to the supply and repair of machinery to a competent agent; it might be gross negligence in him to attempt to do it himself. "But he is bound to use reasonable care, having regard to the nature of the business and the circumstances of the case, to secure their safety and sufficiency." *Holden v. Fitchburg R. Co.* 129 Mass. 268.

"We understand," say the court, in *Fuller v. Jewett*, 80 N. Y. 46, "that acts which the master, as such, is bound to perform for the safety and protection of his employes cannot be delegated so as to exonerate the former from liability to a servant who is injured by the omission to perform the act or duty, or by its negligent performance, whether the nonfeasance or misfeasance is that of a superior officer, agent, or servant, or of a subordinate or inferior agent or servant to whom the doing of the act or the performance of the duty has been committed. In either case, in respect to such act or duty, the servant who undertakes or omits to perform it is the representative of the master, and not a mere co-servant with the one who sustains the injury." And the court held that the duty of maintaining machinery in proper repair devolved upon the master, and he was liable for injuries resulting from a failure to perform it. "The master cannot delegate his duty to select competent servants and safe machinery to another. He must use reasonable care in performing these acts. \* \* \* If the immediate negligence in these cases is that of an agent or servant, and a co-servant is injured thereby, the law imputes the negligence to the master, and the master is liable the same as if the injury had been sustained by a stranger." *Booth v. Boston, etc., R. Co.* 73 N. Y. 38.

Every railroad operator owes to his employes a duty to furnish machinery adequate and proper for the use to which it is to be applied, and to maintain it in like condition, and he is liable for injuries resulting from failure to perform this duty, whether the act was due to personal neglect or the neglect of an agent employed by him. *Kain v. Smith*, 80 N. Y. 458; *Kirkpatrick v. N. Y. Central R. Co.* 79 N. Y. 240. And this is the law of Massachusetts. In *Gilman v. Eastern R. Co.* 13 Allen, 440, the court say: "He [the master] cannot divest himself of his duty to have suitable instruments of any kind by delegating to an agent their employment or selection, their superintendence or repair. A corporation must, and a master who has an extensive business often does, perform this duty through officers or superintendents; but the duty is his, and not merely theirs, and for negligence of his duty in this respect he is responsible." Said *Gray, C. J.*, in *Coombs v. New Bedford Cordage Co.* 102 Mass. 572: "The duty of providing suitable machinery to carry on their business, and a suitable place for the plaintiff to work in, including giving him full notice of the nature of the risks attending the service, was a

responsibility resting upon the defendants, [employers,] which they could not throw off by delegating it to a foreman or to other workmen." This has been declared to be the law in a large number of cases. *Hough v. Pacific Ry. Co.* 100 U. S. 213; *Flike v. Boston, etc., R. Co.* 53 N. Y. 549; *Laning v. N. Y. Cent. R. Co.* 49 N. Y. 521; *Ford v. Fitchburg R. Co.* 110 Mass. 240; *Holden v. Fitchburg R. Co.* 129 Mass. 268; *Arkerson v. Dennison*, 117 Mass. 407; *Drymala v. Thompson*, 26 Minn. 40; *Wedgwood v. Chicago, etc., R. Co.* 41 Wis. 478; *S. C.* 44 Wis. 44; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Mullan v. Phil. S. Co.* 78 Pa. St. 25; *O'Donnell v. Alleghany, etc., R. Co.* 59 Pa. St. 239; *Chicago, etc., R. Co. v. Swett*, 45 Ill. 197; *Lewis v. St. Louis, etc., R. Co.* 59 Mo. 495; *Kansas, etc., R. Co. v. Little*, 19 Kan. 269; *Berea Stone Co. v. Kraft*, 31 Ohio St. 287. Thus, in *Toledo, etc., R. Co. v. Conroy*, 68 Ill. 560, where a servant of the company was injured in consequence of the giving way of a wooden bridge, which had become defective through age and exposure to the weather, it was held that the company could not escape liability by showing that the bridge was properly constructed in the first place, and that it employed skilful and competent subordinates to inspect and repair its bridges. The same rule applies to the individual employer as well as to corporations. *Corcoran v. Holbrook*, 59 N. Y. 517.

But there are authorities which hold that the duty of the master is discharged by the employment of competent agents or servants to furnish the machinery and attend to repairs, and that if a servant is injured through the failure of the persons so appointed to make repairs, it is the negligence of a fellow-servant, and the master is not liable. *Columbus, etc., R. Co. v. Arnold*, 31 Ind. 174; *Wonder v. Baltimore, etc., R. Co.* 32 Md. 411; *Hanrathy v. Northern, etc., R. Co.* 46 Md. 280; *Harrison v. Central R. Co.* 31 N. J. L. 293.

CONTRIBUTORY NEGLIGENCE OF FELLOW-SERVANT. If the master is himself negligent, and the negligence of a fellow-servant of the injured contributes to the accident, this does not exempt the master from liability; it is only the negligence of the injured servant that will have that effect. Thus, in *Paulmier v. Erie R. Co.* 34 N. J. L. 151, where the company negligently allowed the erection of an unsafe trestle-work for the track, and gave the engineer in charge orders not to run his engine thereon, but he disobeyed, and the plaintiff's intestate, a fireman, who was unaware of the orders or of the danger, was thereby killed, the trestle-work giving away, the company were held liable. If a servant is injured in part by the negligence of the master and in part by the negligence of a fellow-servant, he may recover of the master. *McMahon v. Henning*, 3 FED. REP. 353; *Cone v. Delaware, etc., R. Co.* 81 N. Y. 206; *Booth v. Boston, etc., R. Co.* 73 N. Y. 38; *Crutchfield v. Richmond, etc., R. Co.* 76 N. C. 320.

LATENT DEFECTS IN MACHINERY—DUTY OF MASTER TO INFORM SERVANT. As before stated, the master may, if he so chooses, supply unsafe machinery. "Every manufacturer has a right to choose the machinery to be used in his business, and to conduct that business in the manner most agreeable to himself, provided he does not thereby violate the law of the land." *Hayden v. Smithville Manuf'g Co.* 29 Conn. 548. If the defect or danger is latent, and either known to the master, or of such a character that in the exercise of ordinary care he ought to have known it, it is the

duty of the master to inform the servant of its existence. He must either use machinery free from latent dangers, or inform his servant of the existence of such as he either knows or ought to know. *Smith v. Oxford Iron Co.* 42 N. J. L. 467; *Sowden v. Idaho Mining Co.* 55 Cal. 443; *Wedgwood v. Chicago, etc., R. Co.* 41 Wis. 478; S. C. 44 Wis. 44; *Cummings v. Collins*, 61 Mo. 520; *Gibson v. Pacific R. Co.* 46 Mo. 163; *Fairbank v. Haentzche*, 73 Ill. 237; *Paulmier v. Erie Ry. Co.* 34 N. J. L. 151; *Walsh v. Peet Valve Co.* 110 Mass. 23; *Spelman v. Fisher Iron Co.* 56 Barb. 151.

In *Smith v. Oxford Iron Co.*, *supra*, the defendant company introduced into use in its mine a new blasting powder known by its president to be a much more dangerous explosive than the powder before in use. It was held that it was the duty of the company to have informed the plaintiff, a miner, of the danger, and of the proper manner of using the powder; and, not having done so, it was liable to him for injuries sustained while using it. But while the master must use ordinary care to provide reasonably safe and fit appliances and structures for the use of the servant, yet he is not bound to provide against the danger arising from the unnecessary use of such appliances and structures for purposes to which the same are not adapted and designed. *Chicago, etc., R. Co. v. Abend*, 7 Bradw. (Ill.) 130; *Felch v. Allen*, 98 Mass. 572; *Durgin v. Munson*, 9 Allen, 396.

**RIGHT OF MASTER TO CONTRACT WITH SERVANT FOR EXEMPTION FROM LIABILITY.** The question of the right of the master, by an express stipulation in the contract of hiring, to exempt himself from all liability to his servants for the consequences of failure to perform his duty of supplying sound machinery and competent servants, is not settled by the authorities. It would seem, however, that the same public policy that will not allow a common carrier to contract for exemption from the consequences of his negligence, would forbid such contracts between master and servant, especially when their inequality of position is considered. Said *Crompton, J.*, in *Clarke v. Holmes*, 7 H. & N. 937: "It cannot be made part of the contract that the master shall not be liable for his own negligence." And in *Harrison v. Central R. Co.* 31 N. J. L. 293, the court say: "The claim to such exemption is inconsistent with morality and public policy; so much so, indeed, that it might be somewhat questionable whether, if such contract existed in point of fact, and by express stipulation, it would not be on that account void."

There are but two cases that have come to our notice in which this question has been decided: In *Western & Atlantic R. Co. v. Bishop*, 50 Ga. 465, it was held that such a contract was valid, although it may be noticed that it was not necessary to the decision, the plaintiff having been guilty of contributory negligence; and the court further express the opinion that the employer would be liable for utter recklessness or gross negligence, notwithstanding such contract. In a recent case decided in the United States circuit court for the district of Indiana, (*Roesner v. Hermann*, 8 FED. REP. 782,) *Gresham, D. J.*, delivered an oral opinion holding that a contract between employer and employe, whereby the employe, in consideration of the employment, agrees to release and discharge his employer from all damages on account of accident or death to the employe caused by the negligence of his employer or co-employes, is void as against public policy.

W. E. BENJAMIN.



## ADAMS and another v. HOWARD and another.

*(Circuit Court, S. D. New York. October 24, 1881.)*

## 1. PLEADING—ANSWER—DEMURRER.

By putting in an answer to the whole bill, a defendant overrules his demurrer which is also to the whole bill.

*F. H. Betts*, for plaintiffs.

*J. A. Whitney*, for defendants.

BLATCHFORD, C. J. The defendant Morse has demurred to the whole bill and has put in an answer to the whole bill. The suit is one for the infringement of a patent. The grounds of demurrer set forth in the demurrer are all of them also set forth in the answer. They relate solely to the title set forth in the bill to the patent, and to the allegations in the bill respecting infringement. A replication to the answer has been filed. The plaintiffs now move for an order, either that the defendant elect between his demurrer and his answer, or that the demurrer be set down for argument. By rule 32 in equity, a defendant may demur to the whole bill, and may demur to a part of the bill and answer as to the residue. But there is nothing that allows him to demur to the whole bill and at the same time to answer to the whole bill, especially where the answer sets up everything that is in the demurrer. Putting in such an answer is a waiver of such a demurrer. The defendant must elect between his demurrer and his answer; and, to guard against misunderstanding, if he should elect his demurrer, and it should be overruled on argument, he would be held, probably, to have waived what, ordinarily and otherwise, would be, under rule 34, his right to answer.

The defendant moves to dismiss the bill. The ground of the motion is not specified in the notice of motion. From the affidavit made in support of the motion, one ground would seem to be that the plaintiffs did not, under rule 38, set down the demurrer for argument within the time required, and that they did not take any testimony within three months after the replication was filed. I think the plaintiffs sufficiently excuse the omissions. The demurrer ought to be disposed of before any testimony is taken.

The motion is denied.

## YOUNG v. GRAND TRUNK RY. OF CANADA.

*(Circuit Court, E. D. Wisconsin. 1881.)*

## 1. PRACTICE—CONSOLIDATION—DISCONTINUANCE.

- The consolidation of several actions into one will not defeat the right to dismiss as to one or more of the original causes of actions.

*Van Dyke & Van Dyke*, for plaintiff.

*G. W. Hazelton*, for defendant.

DYER, D. J. Three suits were commenced in this court by the above-named plaintiff against the defendant company to recover damages for alleged delay in the transportation of grain which was shipped by the plaintiff over the defendant's road and consigned to Liverpool. The complaints in the several actions were substantially alike, except that the contracts of shipment were alleged to have been made at different times, thus showing that the several shipments were distinct and independent transactions, each constituting a separate cause of action. The defences to the actions disclosed by the answers of the defendant were similar. A motion was made by counsel for defendant to consolidate the cases; and as they are of like nature, and as it appeared reasonable so to do, the court ordered the actions consolidated, and such an order was entered. Rev. St. § 921. The plaintiff now moves for leave to discontinue two of the cases. This motion is opposed, and is now to be determined.

It is contended—*First*, that as the three suits have been, by the order of the court, merged into one, there are no longer two separate cases that can be discontinued. Strictly speaking, this is true; but although the present motion, in form, is one to discontinue two of the actions as originally entitled, I think it may properly be treated as a motion to discontinue as to two of the causes of action in the present consolidated action. And so the question really is, has the plaintiff a right to dismiss his suit as to two of the causes of action upon which he originally commenced independent actions? There can be no doubt that the present consolidated action consists of independent parts or causes of action. Each shipment of grain and each contract upon which the shipment is alleged to have been made constitutes a distinct ground of action. They are not simply different transactions growing out of one contract, but they are independent rights of action of like nature, but having no special relation to each other, and brought together by order of the court for convenience at the trial. At the common law a plaintiff had the absolute right to discontinue his action before or after issue joined, and with-

out leave of court. Under the practice now prevailing in this state this right is recognized, except that where a counter-claim is involved there cannot be such a discontinuance of the whole case as would defeat a trial upon the counter-claim. *Bertschy v. McLeod*, 32 Wis. 205; S. C. 33 Wis. 176; S. C. 34 Wis. 244.

In the case at bar no counter-claim is set up. It was admitted on the argument that the plaintiff has the right to discontinue his present entire suit. If this be so,—if, in other words, he has the right to discontinue as to all the causes of action,—why has he not the right to discontinue as to one of them? Suppose the case should proceed to trial in its present form, and the plaintiff should offer no proof in support of two of the causes of action, would it not be the duty of the court, on application of the plaintiff, to direct the jury to find for the defendant upon those causes of action as in a case of nonsuit? Clearly it would; and in such case the court, in accordance with the usual practice, would enter judgment without prejudice. This I regard a conclusive test upon the question here presented. For if the plaintiff would lose the right to discontinue at the trial, or at that stage to take a judgment of nonsuit as to either or any of the causes of action, it follows as a logical conclusion that the right to discontinue now may be asserted and should not be denied.

But it is contended by the learned counsel for the defendant that to permit the plaintiff to discontinue as to two of the causes of action and prosecute his suit upon the one remaining would involve a disregard of the rule which forbids a splitting up of demands where all should be joined in one suit; and *Bendernagle v. Cocks*, 19 Wend. 207, and *Reformed Protestant Dutch Church v. Brown*, 54 Barb. 191, are cited. The rule invoked, however, goes no further than against several actions for the same wrong or on the same contract, or on several demands resting in matters of account which may be joined and sued for in the same action. And the cases cited reach only to this extent, for they admit that the rule does not extend to distinct contracts. In the syllabus to *Bendernagle v. Cocks*, *supra*, the decision is correctly stated, and is to the effect that where a party has several demands or existing causes of action *growing out of the same contract*, and if the demands or causes of action be split up and a suit brought for part only and subsequently a second suit is brought for the residue, the first action may be pleaded in abatement or in bar of the second action. That case was one of breaches of several covenants contained in the same instrument. The case at bar is one where each cause or right of action springs from an independent

contract. The several contracts have no relation to each other. They are of kindred nature, but they are none the less distinct, and none the less represent distinct and separate transactions between the parties.

It is, however, further urged that as each of the plaintiffs' demands, when taken separately, does not involve an amount sufficient to enable the defendant, if ultimately defeated, to take an appeal, and as the amount of all the demands when united is sufficient to give a right of appeal, the court cannot permit a discontinuance as to two of the causes of action without jeopardizing a substantial right, namely, a right of ultimate appeal. It cannot be claimed that there is any vested right of appeal at this stage of the controversy, nor that such right would accrue until verdict and judgment should pass. The most that can be said is that there is a possible future right of that character. It is not a right *in esse*. Possibly it is not even a right *in futuro*, because the defendant may have verdict and judgment in its favor. Everything in that respect now rests in contingency, and although it may be that if all the causes of action now in suit were to be prosecuted together, and if the defendant were to be defeated, there would then accrue a right of appeal, I do not think that at the present stage the defendant is possessed of such a right in that regard as can be held to forbid the exercise by the plaintiff of his right, which is more in the nature of an absolute, present right to discontinue as to some of his causes of action.

Upon this point, *Pacific Mail Steamship Co. v. Leuling*, 7 Abb. Pr. (N. S.) 37, was cited, in which case it was at least inferentially held that, where a defendant has acquired a right in reference to the subject-matter of the action, a discontinuance in disregard of that right would not be permitted. But the right there spoken of is some right acquired by order or decree of the court already made, and in the face of which a discontinuance is asked. Of course, it is not difficult to understand that litigation between the parties to a controversy may proceed to such an extent, even before the final judgment or decree, that substantial and valuable rights may accrue or become established, and in that event a discontinuance or dismissal, which should take away or affect such rights, would not be permitted. But that is not this case.

The plaintiff will be granted leave to discontinue, without prejudice, his suit as to the two causes of action contained in the complaints, marked Nos. 2 and 3, on payment of the taxable costs in those two cases.

BUELL and others v. CINCINNATI, EFFINGHAM & QUINCY CONSTRUCTION Co. and others.

(Circuit Court, S. D. Illinois. November, 1881.)

1. REMOVAL OF CAUSES—RECEIVERS—CONTRACTORS.

Where a receiver who has been appointed by a state court in the interest of the creditors of a construction company proceeds with the work of construction by entering into contracts, etc., the fact that a controversy arises between him and a contractor, or between a contractor and other claimants of a common fund, does not entitle the contractor to remove the cause to a federal court, especially after the state court has proceeded, without objection, to adjudicate upon the rights of the parties.

Motion at chambers, by William Sturges, to file a transcript of the state court and to docket the cause in this court.

Mr. Cooper and Mr. Kales, for Sturges.

J. C. Black, receiver, pro se.

Dent & Black, for receiver and other creditors.

Mr. Callaghan, for creditors.

DRUMMOND, C. J. The object of the motion is to obtain the opinion of this court upon the question of jurisdiction made in the case. The bill was originally filed by some creditors of the construction company in the circuit court of Crawford county, in this state. The construction company had made a contract for building a railroad, and the bill was in the nature of a creditors' bill for the protection of the interests of the plaintiffs. A receiver was appointed by the state court and was authorized to go on and complete the construction of the road undertaken by the company. Claiming to proceed in pursuance of the authority thus conferred on him, the receiver made the contract in which Mr. Sturges was interested. If this were a question growing out of an ordinary application made to the state court by a claimant of the construction company for the protection of his rights, and asking that the property in its custody might be made available for his claim, in whole or in part, and the claim had originated entirely independent of any action of the state court, possibly there might be some pretence, if the citizenship of the parties justified it, that the cause might be removed. But this is a case where the only right which exists is by virtue of the action of the state court. The receiver of the state court, in a suit pending there, was authorized to perform certain acts; to employ men and to make contracts involving the construction of a railroad. In the ordinary case of a receiver appointed by the court to operate a railroad he may employ agents—as a superin-

tendent, conductor, engineer, or other person—to perform a duty connected with the operation of the road.

It may be that a particular contract which the receiver has made is not authorized, in express terms, by the order of the court appointing him, but still if the act is done under the color of authority of the court, and any controversy arises between the persons employed and the receiver, or between him and other claimants, it would seem as though the court, under whose authority this was claimed to be done, is the proper tribunal to settle it. It could hardly have been in the contemplation of congress that such a course as that supposed would enable a party to transfer a cause to the federal court, where the litigation was pending in a state court. That would be something which grew out of the action of the state court and its officer in the performance of a duty, or what he supposed to be a duty. That was substantially this case. Mr. Sturges has no other standing in this court than what grows out of that posture of the case. He voluntarily went to the state court and asked, through the receiver, that a contract should be made with him. He undertook to perform that contract. It is to be presumed, in the absence of any evidence to the contrary, that he and the receiver both acted in good faith. Upon a question, made in the state court, it was decided that the contract was not authorized by the terms of the order of appointment; but the court also held that Mr. Sturges having performed services and having expended money, it was just he should receive compensation for what had been done, and for the money expended.

I think it may be laid down as a sound principle that if a controversy, under such circumstances, does arise between the contracting party and the receiver, or between him and other claimants to the common fund, out of which they all seek payment, it is not such a controversy as entitles the contractor to remove the cause to the federal court.

In this case, the only question was, what amount should be paid to Sturges for the work and labor done, materials furnished, and money expended. The other claimants, it may be, are in the same condition as himself. They all went before the state court to represent their different claims and insist that they should be paid. Now, is the possibility that there may be a fund less than enough to pay off the various claims, a question of such a character as to entitle a party to remove the cause to this court? I think not. It is true, Sturges may say that some of the petitioners had not a just claim to any portion of the fund, or, if they had, that their claim was subordinate to his. If

that be so, why should not the state court have the right to decide the question? Whatever controversy there is has arisen in that court in the administration of the property or assets which it has taken in charge. It is not the case of an independent controversy which existed when the suit was commenced, but one which has arisen in the execution of the power of the court. It was all done under the color of authority of the state court, and it seems to me that it would be stretching the act of 1875 beyond any case that has yet been decided, to hold that this court has jurisdiction in such a case as this.

It may be added further, and as an additional reason why this court should not now take jurisdiction of the case, that the state court has proceeded without objection to adjudicate upon the rights of the parties. I think that court should be permitted to go on and distribute the fund which it has, or may have in its possession in the case of a sale of the property, to the various claimants. So that, notwithstanding the great anxiety which the counsel seem to manifest, this being the second application of the kind made, this court must decline to take jurisdiction.

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### HANCOCK v. HOLBROOK and others.

(Circuit Court, E. D. Louisiana. June, 1881.)

#### 1. CORPORATIONS—CHARTER—CONTROLLING EFFECT.

The charter of a corporation empowered the board of directors to appoint the corporate officers. *Held*, that mere verbal understandings between individual members of the board prior to the incorporation of the company as to the choice of such officers, would be controlled by this provision.

#### 2. DISSOLUTION OF THE CORPORATION—WHEN JUSTIFIABLE.

The conveyance, under the authority of the board of directors whose action is ratified subsequently by all the stock represented at a meeting of the stockholders, of the total assets of a private corporation in payment of its sole debt, operates as a valid conveyance of the property as against other stockholders, in the absence of fraud and when a longer continuance of the corporate business would be ruinous to all parties.

*H. C. Dibble*, for complainant.

*T. J. Semmes* and *R. Mott*, for respondents.

*BILLINGS, D. J.* This case is submitted for a final decree upon bill, answer, depositions, and exhibits. The suit included Charles T. Howard as one of the defendants, whose claim upon the property hereafter described was admitted by all parties in this suit, and has since been satisfied. His rights, therefore, are not submitted for

adjudication. Of the other defendants, Mr. and Mrs. George Nicholson, (who claim title under A. M. Holbrook,) is demanded twenty of fifty-one equal parts in the establishment known as the "Picayune Newspaper & Printing Establishment," with an accounting and decree for profits. The facts, which are either admitted in the voluminous pleadings or established by the evidence, are as follows:

On the nineteenth day of December, 1873, there existed in the city of New Orleans a corporation known as the Herald Printing Company, which, at that date, bought at sheriff's sale, on a 12-months' bond, for the price of \$20,100, the New Orleans Picayune Newspaper and Printing Establishment, giving as a surety upon the bond Joseph Hernandez. Ex-Gov. H. C. Warmoth induced Mr. Hernandez to go upon the bond, agreed to hold him harmless for so doing, and seems to have been the party really furnishing the security. The Herald Printing Company was a corporation in which the complainant and Alexander Walker were largely interested, and it published a newspaper called the New Orleans *Herald*, of which these last-named gentlemen were editors and managers.

Chiefly through Gov. Warmoth's influence an agreement was formed and carried out, in accordance with which the Herald Company conveyed the *Picayune* establishment, recently purchased, to A. M. Holbrook, who agreed to pay the twenty thousand dollar twelve-months' bond, and a new corporation was formed, under the general law authorizing the same, called the "New Orleans Picayune Printing Company, to print and publish a newspaper or newspapers, and carry on a printing and publishing business of every kind." To this corporation A. M. Holbrook was to convey, and did convey, the *Picayune* establishment, derived from the Herald Company, which constituted its capital, fixed by its charter at \$30,000, and divided into 120 shares, at the par value of \$250 each. Of these shares A. M. Holbrook was to receive, and did receive, 65 shares, the complainant 15 shares, and Alexander Walker 10 shares. The complainant and Walker, along with all the other stockholders, received shares in the *Picayune* establishment in the same proportion as they had held shares in the *Herald* undertaking. The *Herald* was no longer published, and became merged in the *Picayune*, which last was to be conducted under the new charter. That charter provided that "the corporation shall be governed by a board of directors of five persons."

The first board of directors was declared to consist of A. M. Holbrook, Peter St. Armand, R. W. Holbrook, Alexander Walker, and E. C. Hancock, (the complainant.) The board of directors had, by the charter, power given them "to adopt such by-laws as may be necessary to manage the company and appoint such officers and clerks as may be required." It seems to have been distinctly understood, not only that A. M. Holbrook should thus have a majority of the stock, but that of the five directors, who were to serve for at least one year, and who were named in the charter, two should in some sense be representatives of him—namely, Mr. Armand and R. W. Holbrook (his brother)—to each of whom was transferred one of A. M. Holbrook's shares. The corporation went into operation, then, with three directors, who held shares



as follows: A. M. Holbrook, 63 shares; Peter St. Armand, 1 share; R. W. Holbrook, 1 share; E. C. Hancock, 15 shares; and A. W. Walker, 10 shares.

The persons who held the remaining shares were named in the charter, though all the certificates do not seem by the stock-book to have been issued. The complainant subsequently derived title to two shares by purchase,—one from D. P. Penn, and one from the estate of William P. Harper,—and three were donated to him by holders who were personal friends. The charter bears date December 19, 1873. There seems to have been an understanding on the part of the complainant and Judge Walker, which is corroborated by Warmoth, that Walker was to be chief editor and complainant the managing editor, and A. M. Holbrook the business manager. But, unfortunately, this understanding was merely verbal, and was not recognized by the terms of the charter, which placed all these matters under the control of the directors; and, on December 26, 1873, a set of by-laws was enacted, all of the directors being present, and all voting in favor of their adoption except the complainant, which clothed the president (A. M. Holbrook) with authority to “organize the various departments of the paper, and employ and discharge all editors and employees, and fix their salaries, and to have the general supervision of all the operations and transactions of the corporation.” This action of the directory disclosed how wide was the misunderstanding between complainant and Walker on the one part, and A. M. Holbrook, who was sustained by the charter, on the other part.

On the sixteenth day of December, 1874, the 12-months' bond for \$20,100 was to mature. Shortly before this time A. M. Holbrook announced to all concerned his inability to pay the bond, and his determination that the property purchased with the bond should be used in the payment of the bond. Through Warmoth offers were made from Holbrook to Mr. Walker that if he or any of his friends would pay the bond, they should have the *Picayune*. This Mr. Walker was unable to do. Mr. Aroni, as the counsel of some one, at one time offered to make the payment and take the property, but subsequently withdrew the offer.

On December 14, 1874, the majority of the board of directors, the complainant not being present, and Mr. Walker voting nay and protesting, passed a resolution to the effect that if Mr. Hernandez would pay the bond he should have conveyed to him the *Picayune* establishment. On the following day Warmoth, through Hernandez, paid the bond and received the conveyance. The amount paid was \$20,211.

On the twenty-second of December, 1874, a special meeting of the stockholders, called by the directory, passed resolutions ratifying the action of the directors in making the conveyance to Hernandez in payment and settlement of the 12-months' bond, and dissolving the corporation. Shortly after such dissolution, Hernandez, acting for Warmoth, sold and conveyed the entire *Picayune* establishment to A. M. Holbrook for his promissory notes, amounting to \$27,500, falling due in monthly instalments, the last not maturing for several years, and bearing interest at the rate of 6 per cent. per annum.

Two promissory notes had been given by A. M. Holbrook to Warmoth for debts due from the Herald Company to him, and for his services in connection with the paper. These notes were given at the time of the formation of

the *Picayune* corporation, in or about December, 1873, and had no connection with the transfer to Holbrook; and though it is evident they were paid with more readiness by him after the action of Warmoth in making such transfer, or rather that resistance to their collection was withdrawn, they existed long before as the obligations of Holbrook, and have no bearing upon the case, and may therefore be dismissed from further consideration.

The first question to be considered is whether the conveyance of the *Picayune* establishment, executed under the authority of the board of directors and ratified by a meeting of the stockholders, was valid, and could and did, in law, convey title to Hernandez. It is not necessary, in the view I have taken of this case as exhibited in the record, to do more upon this point than to see that the meeting of the stockholders was lawfully convened and regularly constituted; for since this meeting ratified the sale and transfer, and since the members or shareholders are the real principals or constituents of the corporation, if what they did was within the scope of their capacity, and was regularly done in time and manner, it would be conclusively the action of the corporate body. The Herald Company had given a 12-months' bond, in amount upwards of \$20,000, for this very property, and then the same corporators, with the same proportionate interests, had added a new corporator, A. M. Holbrook, and changed the name of the corporation, using the purchased property as a capital. As between the bondholder and the new corporation, to the extent of the purchased property, the bond was surely enforceable against that corporation. The collateral undertaking of Holbrook to pay the bond did not at all affect these relations. The debt was the debt of the New Orleans Printing Company. Indeed, the bill of complaint of the complainant concedes this. At paragraph 23 he says:

"For this petitioner avers and admits that in equity and good conscience, and notwithstanding the fraudulent and illegal combinations and transactions of said A. M. Holbrook, Joseph Hernandez, George Nicholson, Peter St. Armand, and R. W. Holbrook, nevertheless the said New Orleans Picayune Printing Company, and the holders and owners of the remaining 51 shares of stock thereof, owed to the said Joseph Hernandez, or his legal assigns, the amount in money which the said Joseph Hernandez paid for the discharge of the 12-months' bond aforesaid, upon which said Hernandez was surety aforesaid, but *which was primarily the debt in equity and good conscience of the New Orleans Picayune Printing Company, as successor of the Herald Company*, which corporation was legally the principal on said bond."

The thing done, then, was for a corporation, at a meeting of stockholders, to sanction and ratify the application of its property to the payment of its sole debt.

It has been urged by the complainant that the board or directors was constituted so that of five A. M. Holbrook controlled three. But it cannot be denied that a board of directors, who are specially designated by name in the charter of the corporation, have authority to call a meeting of stockholders. A board of directors thus designated convened the stockholders who acted upon this subject. At this meeting 91 shares were present and voted for the ratification. The stock-book of the company shows that the persons so present and voting were the representatives of genuinely-issued stock. So far as relates to the question of the competency of the stockholders to make the ratification, it is immaterial to inquire how much of this stock A. M. Holbrook owned, provided he actually owned it. This question may be material in another aspect of the case, which I shall consider further on, namely: What consequences in equity and law would follow after he acquired the property? But there was nothing in the fact that he owned the majority or the entirety of the stock present and voting, provided he had acquired it in the prescribed manner, and actually owned it, which would detract from the force of the vote.

If it were necessary to decide whether, and it should be decided, that, upon Holbrook's default in the payment of the bond, the 65 shares of the stock first received by him had in equity reverted to the corporation, and therefore should be treated as not voting, the case would stand thus. There were originally 120 shares, only 109 of which had been issued. McComb had surrendered his four shares to the corporation; so that counting all as issued, which I think should be done, we have, besides the 65 shares, 26 other shares present and voting aye. There being but 116 shares, there could have been only 25 outstanding shares, issued and unissued, which did not assent to this transfer, and the 26 shares assenting constituted a majority of the stock, even after excluding the 65 shares.

What are the powers of stockholders, and of a majority of stockholders, under our statute and at the common law? The Revised Statutes (Voorhies' Ed.) § 687, (Acts of 1852, p. 130, § 5,) provide that "it shall be lawful for the stockholders of any corporation, at a general meeting convened for that purpose, to make any modifications, additions, or changes in their act of incorporation, or to dissolve it, with the assent of three-fourths of the stock represented at such meeting." Here is authority so broad that it cannot be questioned, that it includes much more than the appropriation of all the property of a corporation to pay a debt which it owed; and the vote

was not only three-fourths, but *all* of the stock represented at the meeting.

At the common law the right of the majority of the stock to control the operations and winding up of corporations like this, not of a public character, is undoubted.

In *Pratt v. Jewett*, 9 Gray, 34, a majority in number of stockholders, owning a minority of stock, petitioned for a dissolution of a manufacturing company. In their petition they averred, among other things, that "a sole owner of a majority of the stock had for many years controlled the election of officers, and elected himself agent and clerk, and that he had for a long time managed the business according to his own will and choice, regardless of the wishes and interests of the petitioners; that according to his statement the corporation had been doing a losing business for years; and that he refused to make any change in the business, or to purchase the shares of the petitioners." The court answered that no sufficient reason was shown for a dissolution of the corporation; that "Jewett, owning more than two-thirds of the stock, was entitled to the control; that the true misfortune of the petitioners seemed to be that they are in the minority, and cannot control the majority of the stock."

In *Treadwell v. Salisbury Manuf'g Co.* 7 Gray, 404, the court say:

"We entertain no doubt of the right of a corporation, established solely for trading and manufacturing purposes, *by a vote of the majority of their stockholders*, to wind up their affairs and close their business, if, in the exercise of a sound discretion, they deem it expedient to do so. At common law the right of corporations, acting by a majority of their stockholders, to sell their property is absolute, and is not limited as to objects, circumstances, or quantity." See, also, authorities there cited.

Although the act of transfer was within the capacity of the members of the corporation, and their sanction to it was in form legal and effective, and Hernandez took title under it, and gave title to A. M. Holbrook, this does not necessarily conclude the complainant, or close the door to relief in his behalf.

There remains the vital question, whether the transfer from the corporation to Hernandez was effected in fraud of the complainant's interests, or whether, by his own conduct with reference to the publication of the *Picayune* newspaper, the transfer was rendered justifiable and expedient. On behalf of the complainant, it is claimed that A. M. Holbrook received 65 shares of the stock in consideration of his agreement to pay at maturity the 12-months' bond; that large

powers were given to him in the board of directors in consideration of the same agreement; that when he suffered default to be made in the payment of the bond, and permitted the publishing establishment to be applied to its satisfaction, he violated a *quasi* trust; and that, upon his purchase of the establishment, he must be treated as holding it in trust for the complainant to the extent of his former proportionate interest. On behalf of the respondent, it is claimed that all of the stock, except that held by the complainant, has for a long time been owned by them; that the reason of the sale to Hernandez was not any wish or purpose to defraud the complainant, or any of the stockholders, but that the cause which necessitated it was the incurable dissensions between Walker, A. M. Holbrook, and the complainant, and a continued refusal on the part of complainant to comply with the charter and by-laws made in pursuance thereof, so far as related to the conduct of the paper; and that in consequence of this dissension on the part of those in interest, and the defection of the complainant, the paper became so crippled financially that it was impossible for A. M. Holbrook to pay the bond at maturity, and the only wise disposition of the paper that could be made in the interest of all the corporators was to apply its entire establishment to the payment of its sole debt.

As furnishing aid in solving this question, it is important to determine whether the sale to Hernandez was made in order to enable a disrupted corporation to dispose justly of its assets in payment of its debt, or whether it was a step in a fraudulent scheme to convey the property through Hernandez to Holbrook. The action of Warmoth would fairly indicate the controlling purpose of the movers, as his liability to indemnify Hernandez for his becoming security on the \$20,000 bond must have led him, and his intimate relations with both Holbrook and Hernandez must have enabled him, to know thoroughly the transaction from beginning to end. His action in this matter stands for that of Holbrook. He (Warmoth) testifies on this subject that, after learning of Holbrook's inability to pay the bond, he informed Alexander Walker—who, it must be remembered, stated, in his protest against the conveyance to Hernandez, that he represented the entire non-assenting stock, including all of complainant's—"that if he or any of his friends would pay the bond, they should have the property, namely, the *Picayune* establishment. At one time he said he would pay the bond and take the property, which he never did." This is confirmed by the testimony of Judge Walker.

If Holbrook had proposed to defraud and to acquire title by having

the bond enforced, would he have gone to those whom he is charged with compassing to defraud and offered the coveted title upon payment of the bond? It would be extremely difficult to reconcile this offer with any conspiracy to defraud the complainant or Walker, or with any scheme to secure the property for Holbrook, or with any other purpose save that of judiciously closing up an enterprise which, from incurable discord, had to be abandoned as a failure. Holbrook's purchase of the additional stock is reconcilable with the same purpose, stimulated by a desire, by payment of Hernandez's bond through the assets of the company, to relieve himself from a loss which he felt the fault of others, including complainant, would more justly place upon them than him.

The charter placed the control of the whole business in the hands of the directors, and they, by their by-laws, gave the editorial and business management into the hands of A. M. Holbrook, the president. Though this may have been distasteful to the complainant, since done in accordance with the supreme and organic law of the corporation, it constituted no good ground of his withdrawal of his aid and co-operation from the joint enterprise. There could be no prior understanding between members of a corporation which could prevent the supremacy of its charter as constituting the rule for its operations and the law for its members.

Still, the complainant seems to have been so impressed with the idea that the adoption of the by-laws of December 26, 1873, which gave the supervision over the editors to the president, was a violation of the understanding with which he had entered into the corporation, that he states in his testimony that "he felt from that time that he could not attend any meeting of the board of directors, or assume any connection with the *Picayune*, without condoning a fraud and jeopardizing my own interest and those of other stockholders of the paper. He stood ready to resume his post as managing editor, and never refused to perform any duty in that line." The fact of this position of resistance to the by-laws upon the part of the complainant is stated by nearly all witnesses who testify on the subject.

Alexander Walker says: "Mr. Hancock never attended any meetings of directors but one or two, and he retired from the board and retired from the establishment, and I never saw him or held any consultation with him during the year following." He says, also: "We of the Herald Company had been exceedingly dissatisfied with the assumption of the entire control of the establishment by Mr. Holbrook."

St. Armand, though on the cross-examination he seems to have derived much of his information from Holbrook, expresses the opinion that the paper became a source of loss in its publication, and that it became such in consequence of a want of cordial assistance from the complainant and Walker.

Ex-Gov. Warmoth, who was the friend of the complainant, of A. M. Holbrook, and of Judge Walker, who had the fullest opportunity of knowing of their relations and conduct in connection with the newspaper, as well as of the facts concerning the newspaper itself, says that about the time the '12-months' bond was falling due Holbrook informed him he could not pay it. He further testifies:

"He [Holbrook] and Hancock and Walker, who were, by agreement, to be managers and editors of the *Picayune* newspaper, under the control of Holbrook, had disagreed. Each one wanted to have the whole control of the editorial department. In consequence of this Hancock did not give the aid which was expected, nor the countenance and assistance which was so necessary to the success of the paper. He was an able and influential newspaper man, and his defection was a serious drawback to success, and the enterprise eventuated in a failure."

Upon cross-examination he gives the language which each of those gentlemen used with reference to the other two. It evidenced such total distrust and such bitter personal feeling that successful joint action on their part in any business was beyond reasonable expectation. It would be essential in any business, but absolutely necessary in the business of conducting and publishing a daily newspaper, in which such practical sagacity and untiring vigilance is demanded, in which one day of inaction or ill-advised action in consequence of dissension on the part of managers might entail irreparable pecuniary loss upon proprietors. The testimony of Gov. Warmoth, thus corroborated, establishes the continued dissension on the part of these three leading newspaper men, the withdrawal of the complainant, and the damaging effect of this upon the interests and prospects of the newspaper. The testimony as to the value of the *Picayune* establishment is to be considered with reference to these facts. The witnesses vary in their estimates, ranging from \$5,000 to \$100,000. But it is clear that unless the internal obstacles could be removed the paper could have had but little value beyond the type and material. A year previous it had been sold for \$20,000 on a 12-months' credit. Fourteen months afterwards it was appraised in the succession of A. M. Holbrook at \$30,000. At the time of the sale to Hernandez it was offered by Warmoth to those in interest for the amount

of the bond, less than \$21,000, and no purchaser could be found. Warmoth testifies that he regarded the long notes of Holbrook for \$27,500 as worth scarcely more than 25 per cent. of their face. The estimate of witnesses cannot outweigh these facts, and the question before the court is as to the wisdom of the sale with reference to a corporation situated in its internal relations precisely as this was; that is, rent and paralyzed by serious and unabating animosities and differences on the part of those who were its directors and sources of chief energy.

Under the circumstances, the sale on the part of the stockholders was justifiable and judicious. It would have been utter ruin to have continued the publication of a paper so situated—ruin for all concerned. The language of the supreme court of Massachusetts in *Treadwell v. Salisbury Manuf'g Co.* 7 Gray, 405, may with propriety be adopted as decisive of this question. The court say: "Upon the facts found in the case before us, we see no reason to doubt that the vote of the majority of the stockholders for the sale of the corporate property and the closing of the business of the corporation was justified by the condition of their affairs. Without available capital, and without the means of procuring it, the further prosecution of their business would be unprofitable, if not impracticable."

But, it is urged by the solicitor of the complainant, Holbrook was acting as and with the responsibilities of a trustee, and when he repurchased the property he held it in trust for the complainant to the extent of his former proportionate interest in the corporation. Holbrook had undertaken to pay the 12-months' bond, and he failed to perform his undertaking. True, he did fail in carrying out that undertaking, and the property of the corporation was applied to pay a debt which, as between it and Holbrook, belonged to him to pay. But it is established that Holbrook's inability to pay the bond, and the inability of the corporation to prosecute profitably its corporate business, resulted largely from the continued refusal on the part of the complainant to acquiesce in the charter, and from discordant views and action in which complainant largely participated. In consequence of this an enterprise, which the testimony shows might have been advantageous both to complainant and Holbrook, was rendered a failure, and Holbrook, who had received nothing but the 65 shares of stock, allowed that to pass, with that of the other holders, to Hernandez, in payment of a debt which existed prior to his acquisition of the stock. The business of the corporation had become a failure, and the court finds that the defection and withdrawal of the com-



plainant from this business, which he was bound to aid and assist, was, to a large extent, the cause of the failure. Under these circumstances, the complainant cannot urge as a cause of action in a court of equity that Holbrook restored to the corporation all he had received, placed it, so far as possible, in *statu quo*, and did not prevent the application of its property to the extinction of an obligation which had existed before he had any connection with it.

The complainant has failed to establish his cause, and the decree must be that the bill be dismissed.

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TRADERS' BANK OF CHICAGO v. TALLMADGE and another.

(Circuit Court, S. D. New York. October 25, 1881.)

1. REMOVAL OF CAUSES—FIRST TERM.

After the expiration of a term of the state court at which the suit could be legally tried, it is too late to file a petition for its removal to this court.

2. SAME—JURISDICTION—STATE COURT.

The circuit court is not precluded by the decision of the state court from determining for itself whether or not the removal was made in time.

*Strong & Cadwalader*, for plaintiff.

*James C. Foley*, for defendants.

BLATCHFORD, C. J. This is a suit at law, commenced in a court of the state and removed into this court by the plaintiff. Each defendant answered separately in the state court.

The case was duly noticed for trial by the plaintiff and by each of the defendants for a term of the state court, to be held on the first Monday of May, 1881, which was May 2d. All the notices of trial were served on or before April 18th. On April 18th the state court, on the application of one of the defendants, made an order that the plaintiff file security for costs within 10 days from the service of the order, or show cause to the contrary on April 29th, and that in the mean time, or, if security should be filed, then until such security should justify, if excepted to, the plaintiff's proceedings should be stayed. This stay continued till May 14th, when it ended. On the seventh of May each defendant gave notice of a motion for May 16th for a commission to take testimony in Missouri, and for a stay of the trial of the action till the return of the commission. On the first of September the plaintiff filed a petition for the removal of the suit into this court. The order of removal was made by the state court on that day. It states that the petition was filed "before the term at which said cause could be first tried, and before the trial thereof, to-wit, on the first day of September, 1881." The petition bears date August 24th, and was verified August 25th. It states that issue was joined on or about April 15, 1881; "that the said suit is not yet ready for trial; and that the same could not be tried at the last term of the court, nor can it be

tried at the present term, and no trial has been had." The order of removal was made without any prior notice to the attorney for the defendants. There was a trial term of the state court which commenced the first Monday of May. The plaintiff, on the fifteenth of April, placed the cause on the calendar of the court for that term. There is nothing to show how long that term continued. The motions for commissions were adjourned from time to time till September 5th. A trial term of the state court was held in the month of June, 1881. It does not appear that the case was noticed for trial for that term by either party. That term commenced June 6th and ended prior to September 1st. The defendants move to remand the suit.

It is plain that the suit was not removed in time. There was nothing to interfere with its being tried legally at the June term. The notice of motion for a commission and a stay was not a stay. The plaintiff was bound to remove the suit, at least, before the end of the June term, if he was to remove it at all. *Forrest v. Keeler*, 17 Blatchf. 522.

The plaintiff contends that the question of time cannot be considered in this court, because the state court passed upon it in its order. It is true that the state court adjudicated upon it, but it did so *ex parte*, and without a hearing of the defendants. The act of March 3, 1875, (18 St. at Large, 470, § 5,) provides that if, in any suit removed to this court, it shall appear to its satisfaction, at any time after the suit is removed, that it "does not really and substantially involve a dispute or controversy properly within the jurisdiction" of this court, this court shall proceed no further therein, but shall remand it to the court from which it was removed. This provision has recently been construed by the supreme court in *Babbitt v. Clark*, 103 U. S. 606, 610. It is there said by the court that a decision by the circuit court that the necessary steps were not taken to remove the case, is a decision of the question of its jurisdiction; and that the question of whether a removal was made in time, is a question of jurisdiction. In that view, it is for this court to determine its jurisdiction, however that question may previously have been decided by the state court.

The motion to remand is granted.

## PLIMPTON v. WINSLOW.

(Circuit Court, S. D. New York. November 12, 1881.)

## 1. STATE COMITY—SERVICE OF PROCESS.

A party to a suit which has been brought in a circuit court of the United States is protected from the service of process and papers in another suit between the same parties for the same cause of action, which has been commenced in a circuit court in another state, while attending there a regular examination of witnesses in the former suit.

In Equity.

*E. N. Elliot*, for plaintiff.

*Wetmore, Jenner & Thompson*, for defendant.

BLATCHFORD, C. J. A suit in equity brought by the plaintiff in this suit against the defendant in this suit, for the infringement of letters patent, is pending in the circuit court for the district of Massachusetts.

Prior to November 2, 1881, it had been verbally agreed between Mr. Roberts, the counsel for the defendant, and Mr. Clark, the counsel for the plaintiff, in the suit in Massachusetts, that the defendant might have testimony on his behalf taken in the city of New York for use in that suit before Mr. Thompson, as a special examiner, and Mr. Clark verbally agreed to attend before Mr. Thompson at any time, on telegraphic notice, for the purpose. Such notice was given that the plaintiff, together with the defendant and Mr. Roberts, attended in New York, before Mr. Thompson, on November 2d. Mr. Clark was not present on that day. Witnesses were examined on that day on behalf of the defendant, before Mr. Thompson, by Mr. Roberts, as counsel for the defendant, with the acquiescence of the plaintiff, who was present during the examination, and it was agreed between the plaintiff and Mr. Roberts that Mr. Clark should have the right to afterwards cross-examine the said witnesses and enter objections to all questions in the direct testimony; and the examination was adjourned to November 3d. On that day Mr. Clark appeared and cross-examined the said witnesses, and also, in conjunction with Mr. Roberts, signed a stipulation in writing, dated November 2d, and entitled in the Massachusetts suit, stipulating and agreeing that Mr. Thompson might be appointed a special examiner by the court of Massachusetts to take the testimony for the defendant in the suit in New York, under the sixty-seventh rule in equity, as amended. After the adjournment on the second of November, and on that day, the defendant was served personally in the street in New York, after he had left the building where the examiner's office was, and a few steps therefrom, with a subpoena to appear and answer in this suit, and with a copy of the bill and other papers in this suit, and notice of a motion to be made for an injunction herein. The bill in the suit was filed November 2d, and is a bill for the infringement of the same letters patent. The defendant now moves to set aside the service of the subpoena and the other papers on the ground that the privilege of the defendant was violated.

It is very clear that the motion must be granted. The defendant attended as a party before the examiner. The regularity of the examination was recognized by the attendance of the plaintiff, by the arrangement he then and there made for future cross-examination by Mr. Clark, and by the antedated written stipulation which Mr. Clark signed the next day. The examination was thus made a regular proceeding in the suit in Massachusetts. The defendant had a right to attend upon it in person, whether he was to be himself examined as a witness before Mr. Thompson or not, and he had a right to be protected, while attending upon it, from the service of the papers which were served in this suit. He attended in good faith, the examination was pending and unfinished, and he was served during the interval of an adjournment. The privilege violated was a privilege of the Massachusetts court, and one to be liberally construed for the due administration of justice. *Juneau Bank v. McSpedan*, 5 Biss. 64; *Brooks v. Farwell*, 4 FED. REP. 166; *Bridges v. Sheldon*, 7 FED. REP. 17, 42.

The only objections urged against the motion are technical ones—that the written stipulation was not signed till after the service was made; that there was no order as to the examination entered in the Massachusetts court; that no formal written notice of the intended examination was served; that the sitting before the examiner was, therefore, unauthorized; and that the written stipulation cannot have an effect as of a date earlier than November 3d. If these objections were allowed to have force, the plaintiff would only be placed in the position of having, by the prior verbal arrangements made, sanctioned by the subsequent action of himself and his counsel thereunder, decoyed the defendant to visit New York by deceptive inducements, and thus the case would be brought within the principle laid down in *Union Sugar Refinery v. Mathiesson*, 2 Cliff. 304, and in *Steiger v. Bonn*, 4 FED. REP. 17. The plaintiff and his counsel, by what they said and did, represented to the defendant that the proceeding before Mr. Thompson was regular and orderly and authorized, and induced him to rely on that view. He had a right, as a party to the Massachusetts suit, to attend a regular examination of witnesses in that suit in New York, and to be protected, while so attending, from the service of the papers in this suit. The plaintiff is estopped from raising the objection as to regularity.

The motion is granted.

## MARVIN v. ELLIS.\*

*(Circuit Court, E. D. Louisiana. November 15, 1881.)*

## 1. PROMISSORY NOTES—ACTION ON—PARTIES.

The assignee of a mortgage note can bring suit upon it, whoever the real owner may be, unless it was assigned for the purpose of depriving the mortgagor of a substantial ground of defence against the real owner.

## 2. JURISDICTION—CITIZENSHIP—FRAUD.

The circuit court has no jurisdiction of a cause on the ground of the citizenship of the parties, where the nominal parties to the suit are not the real parties, but have been made parties collusively, to bring the controversy within the jurisdiction of the court.

**In Chancery. On demurrer to cross-bill for injunction.**

Complainant filed a bill in equity to foreclose his mortgage upon the plantation of defendant, and, under the statutes of Louisiana, prayed for a writ of seizure and sale, directed to the marshal to seize and sell the same to pay his debt, which writ duly issued, and the plantation was seized and advertised for sale. The defendant then appeared, and, under a rule of this court, filed a cross-bill, in the nature of what is known in the state practice as an opposition to the writ of seizure and sale, and alleged that the plaintiff was not the true and lawful owner of the mortgage notes sued upon, but was a party interposed for the purpose of giving jurisdiction to this court; the real holders and owners being citizens of the same state as defendant, and against whom defendant had equities to plead, which he sets up. Complainant then filed a general demurrer to the cross-bill, and the case was argued on that.

*Geo. L. Bright*, for complainant.

*Nicholls & Carroll*, for defendant.

PARDEE, C. J. Everything alleged in the petition or cross-bill of defendant may be true, with the exception hereafter noted, and yet he can have no relief—is entitled to none. The assignment to Marvin of the notes sued on, no matter what the interest actually conveyed, vests the title sufficiently in him to sue; and Louisiana authority is clear to that effect. Defendant has no right to inquire whether the plaintiff, in whom the legal title appears to be vested, be an agent or the real owner, unless, by a fictitious assignment, it be attempted to deprive him of substantial grounds of defence which he may have against the true owner. The judgment will be *res adjudicata* against every one who might afterwards claim an interest in the note or bill. See Hennen's Digest, 180, No. 5, and authorities there cited, particularly 14 La. 256. The plaintiff having a sufficient title to bring suit, and being a citizen of another state, while the defendant is a citizen of this state, the suit may be brought in this court. See section 1 of

\*Reported by Joseph P. Horner, Esq., of the New Orleans bar.

the act of Congress approved March 3, 1875, and note the difference between that act and the first paragraph of section 629 of the Revised Statutes, with regard to promissory notes, negotiable by the law-merchant, and bills of exchange. But the petition or cross-bill in this case alleges in substance that the party plaintiff has been collusively made for the purpose of bringing the case within the jurisdiction of this court, and this presents an issue or showing under the sixth section of the act of 1875, to which the plaintiff ought to reply.

The demurrers herein filed will be sustained, except so far as the issue just referred to is concerned, and that will leave the petition or cross-bill substantially a plea to the jurisdiction, on the ground that the plaintiff Marvin has been collusively made a party, in order to give the court jurisdiction.

Costs of the demurrer to be paid by the defendant.

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SIoux CITY & ST. PAUL R. CO. *v.* RICE.

ST. PAUL & SIoux CITY R. CO. *v.* THE SAME.

(*Circuit Court, D. Minnesota.* November, 1881.)

1. SWAMP LANDS—ACT OF CONGRESS—WHEN TO TAKE EFFECT.

Title to swamp land was not vested by the act of congress of September 28, 1850, until the admission of a territory into the Union. Hence, the state of Minnesota not having been admitted into the Union at the date of the passage of the act granting lands to the territory or future state of Minnesota for the construction of railroads, approved March 3, 1857, a grantee of the state, by virtue of the acts of the legislature approved March 8, 1861, and March 4, 1864, has a good title as against one whose title depends upon the proper construction of the acts of congress approved September 28, 1850, and March 12, 1860.

*E. C. Palmer*, for complainant.

*John B. & W. H. Sanborn*, for defendant.

NELSON, D. J. This suit is instituted to establish the superior right of the complainants to the land in controversy. The equitable title is claimed to be in the complainant and the legal title in the defendant. The defendant's title is derived from the state of Minnesota by conveyance under the authority of an act of its legislature, the land being described as swamp, and certified to the state as swamp lands belonging to it by virtue of the acts of congress approved September 28, 1850, and March 12, 1860. The complainant's title is claimed to be vested under the act of congress passed March 3, 1857,

granting lands to the territory or future state of Minnesota to aid in the construction of railroads, and subsequent acts, disposing of those lands for that purpose, passed by the legislature of the state March 8, 1861, and March 4, 1864.

## CONCLUSIONS.

1. The state of Minnesota was admitted into the Union May 11, 1858, and the title under the swamp-land act did not take effect until the date of this act of admission.

2. The title to the land in controversy was in the United States at the time of the passage of the act granting lands to the territory or future state of Minnesota for the construction of railroads, approved March 3, 1857, and there is nothing in the acts of congress of September 28, 1850, which prevented congress from granting this land for that purpose.

3. The land was not reserved out of that grant by any of the provisions embodied in the act of March 3, 1857, but is located within the limits prescribed therein, and enured to the complainant's benefit, and the title became vested in it by virtue of the acts of the legislature of the state of Minnesota, approved March 8, 1861, and March 4, 1864.

The complainants are, therefore, entitled to a decree, and it is so ordered.

McCARY, C. J., concurred.

## UNITED STATES v. FRENCH.\*

(Circuit Court, E. D. Pennsylvania. October 7, 1881.)

1. DISCHARGE OF SEAMEN—WHEN NOT REQUIRED TO BE IN PRESENCE OF SHIPPING COMMISSIONER—REVISED STATUTES.

Section 4549, Rev. St., which requires that the discharge of seamen should, in certain cases, be made in the presence of a shipping commissioner, is qualified by the language of section 4504, and does not apply to a vessel which has been engaged in a voyage to the West India islands.

This was an action against the master of a vessel to recover the penalty prescribed by section 4549, Rev. St., for the discharge of a seaman without going before a shipping commissioner. On the trial (before *Bradley* and *McKenna*, JJ.) plaintiff proved that the defendant was the master of the American schooner *Dora M. French*; that

\*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

he sailed from a port in Maine for a voyage from thence to Barbadoes and thence to Philadelphia; and that on his arrival at the latter port he paid off and discharged one of his crew without going before a shipping commissioner.

*John K. Valentine*, U. S. Dist. Atty., for plaintiff.

*J. Warren Coulston*, for defendant.

The court directed the jury to find a verdict for defendant, and subsequently filed the following opinion:

PER CURIAM. An examination of the Revised Statutes makes it very evident that section 4549 is to be qualified by section 4504. The act of June 7, 1872, providing for the appointment of shipping commissioners and for the further protection of seamen, required that the payment and discharge of seamen should in certain cases be made before a shipping commissioner, and that an agreement, in writing, in a certain specified form, should be entered into with every seaman shipped for a voyage. See the act, 17 St. at Large, 262. The act, by its terms, applied to vessels bound from a port in the United States to any foreign port, or if of 75 tons, or upward, bound from a port on the Atlantic to a port on the Pacific, or *vice versa*. It was provided, however, that the master might himself act as commissioner in any customs district where no commissioner had been appointed, and that the act should not apply where the seamen are by custom or agreement entitled to participate in the profits or results of a cruise or voyage, nor to coastwise or lake-going vessels that touch at foreign ports. See sections 12-22. By a supplement passed January 15, 1873, (17 St. 410,) the above proviso was enlarged by excepting from the operation of the act vessels engaged in the trade between the United States and the British North American possessions, or the West India islands, or the republic of Mexico. The Revised Statutes, in section 4504, embody all these provisos. The only question or doubt that can be raised, grows out of the phraseology of section 4549, which declares generally that all seamen, discharged in the United States from merchant vessels engaged in voyages from a port in the United States to any foreign ports, or, being of 75 tons or upward, from a port on the Atlantic to a port on the Pacific, or *vice versa*, shall be discharged and receive their wages in the presence of a duly-authorized shipping commissioner, except in cases where some competent court otherwise directs, without any reference to the excepting provisos. But if the master himself may not be regarded in certain cases as a duly-authorized shipping commissioner, in the terms of the section, there can be no doubt that the



section is to be qualified by the language of the 4504th section, which expressly declares that nothing in this title shall prevent the owner, consignee, or master, of any vessel, except vessels bound from a port in the United States to any foreign port, other than vessels engaged in trade between the United States and the British North American possessions, or the West India islands, or the republic of Mexico, etc., from performing himself, so far as his vessel is concerned, the duties of shipping commissioner. This language expressly applies to the whole title, and, of course, to section 4549, which is a part of it.

We are perfectly satisfied that the revision has not altered the previous law, and that the act does not apply to a vessel which has been engaged in a voyage to the West India islands, which was the present case. We think, therefore, that the defendant is not liable for the penalty sued for, and that the verdict must be in his favor.

The same conclusion, in effect, was reached by the supreme court of the United States in the case of *U. S. v. The Grace Lothrop*, 95 U. S. 527, where the question was, whether a written agreement, as required by the act of 1872, should be executed in the presence of a shipping commissioner, when the ship had been engaged in a voyage to the West Indies; and it was decided that the act in its original form, or as revised, did not apply to the case.

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### WHITE v. CRAWFORD and others.

(Circuit Court, D. Minnesota. November, 1881.)

#### 1. PROVING CLAIM IN BANKRUPTCY—LIENS—WAIVER.

A creditor waives any lien he may have upon the property of his debtor, by proving up his debt as an unsecured claim.

Robert P. Lewis, one of the defendants, on the seventh day of June, 1875, gave his note, and a mortgage to secure the same, on the S. W.  $\frac{1}{4}$  of section 22, in township 30, range 22, excepting therefrom five acres in the S. E. corner thereof, to John W. White, the plaintiff, intending, however, to convey such property in township 29 instead of township 30. On the first day of July, 1876, the said Lewis gave a second note, and a mortgage to secure the same, on the same property as described in the first mortgage, as also upon a certain other piece of property; but, in this second mortgage, making the same mistake as in the first. Again, September 1, 1877, the said Lewis, having discovered his mistake made in the first and second mortgages, makes a third mortgage for the purpose of correcting the mistake, in which he describes the property as being in township 29. Between the giving of the first two mortgages and the third, correcting the first two, one James A. Crawford, a

brother or near kin of Alexander Crawford, obtains a judgment against Robert P. Lewis and pretends to docket the same, which judgment was thereafter, February 4, 1878, assigned to the defendant Alexander Crawford. Upon this judgment the said Alexander Crawford issued execution, which was levied on this property in township 29, and the same was sold April 8, 1879, he buying it in for the sum of \$1,800. Prior to this sale, however, the said Alexander Crawford had due notice of the mortgage claim of plaintiff upon this land. Prior to said execution and sale R. P. Lewis commenced proceedings in bankruptcy for a discharge from his debts, to-wit, on August 31, 1878; his discharge being granted April 15, 1879, only seven days after the sale of said property. During the pendency of the proceedings in bankruptcy, and prior to the execution and sale, the said Alexander Crawford proved up his entire claim in the bankrupt court, without any reference to his lien upon this property, making affidavit that he had no lien upon this or any other property.

*E. Webb*, for plaintiff.

*R. B. Galusha*, for defendant Crawford.

NELSON, D. J. I have examined this case, and find nothing new presented which can reverse the decision already made and set aside the order for a decree. The defendant Crawford proved his debt as an unsecured claim, and made affidavit to that effect in the form prescribed by law. Subsequently he issued execution on the judgment, pending the bankruptcy proceedings, and attempted to collect this claim, which was in judgment and a lien upon real estate at the time, as he now insists, when he made and filed his proof. If he was a creditor having a lien, by proving his debt secured thereby to the full amount he waives his lien, and relinquishes it. Such has been the ruling even in respect to mortgages upon specific property. Before a secured creditor can prove his full claim as an unsecured debt he must surrender the security. There is no distinction made in the kind of security. 1 B. R. 485, 400, 147; 8 B. R. 241. Crawford could have refused to prove his debt or appear in the bankruptcy court, and looked to the lien which he claims his judgment gave him; and unless the assignee took action and assumed control of the property on which the lien attached, might have subjected it to the discharge of his debt. But he did not do this. He acted upon the theory that he could prove his debt as unsecured, and at the same time enforce the lien which the judgment gave him. There is no support for such a claim. 95 U. S. 764.

The complainant's equity is superior, and the order for a decree must stand.

*In re* HELLER and another, Bankrupts.

(District Court, D. New Jersey. October 17, 1881.)

1. BANKRUPTCY—DISCHARGE OF THE BANKRUPT.

Where there are no assets, the bankrupt is entitled to his discharge on making application after the expiration of 60 days from the adjudication of bankruptcy, and before the estate has been settled and the assignee discharged.

2. SAME—SAME.

The right of a bankrupt to a discharge depends upon his own acts. Unless a party thereto, he is not bound by the acts of commission or omission of his former partner.

On Specifications against the Discharge of Rudolph Heller.

*E. A. S. Man*, for opposing creditor.

*C. F. Hill*, for bankrupt.

NIXON, D. J. Under the specifications and evidence in this case I think the bankrupt is entitled to his discharge. The objection, interposed by the counsel of the opposing creditors, that the petition was filed too late, is not valid. It is true that no assets have come to the hands of the assignee, and in such a case the act originally required that the application for discharge should be made within one year from the adjudication of bankruptcy. Rev. St. § 5108. But this provision was changed by the supplement of July 26, 1876, (19 St. at Large, 102,) in which the limitation of one year was dropped, and the application was allowed, where there were no assets, "at any time after the expiration of 60 days, and before the final disposition of the cause." I have heretofore held that this expression, "the final disposition of the cause," means the settlement of the estate and the discharge of the assignee. No such settlement or discharge has taken place in the present case.

The only specifications that the evidence tends to support are the two following:

(a) "That the said bankrupts have never delivered any of the books of account or writings of their firm to Moses Mendal, the assignee in bankruptcy duly appointed by the court, though requested so to do by him, but have fraudulently kept, detained, and concealed the same; that such detention and concealment of said books of account and writings was done wilfully by said bankrupts, and for the express fraudulent purpose of concealing the condition of their estate and effects, and to prevent and hinder their creditors from ascertaining the same, and to conceal their own fraudulent acts and doings in relation thereto, and to hinder and prevent their creditors from deriving any benefit therefrom. (b) That neither the said Heller nor the said Katz have delivered to the said Moses Mendal, assignee as aforesaid, their books of

account and writings relating to their property and effects; that in omitting so to do they acted fraudulent and negligently, and to hinder and impede their creditors, and contrary to the provisions of the said act."

These specifications, doubtless, were intended to incorporate the provisions of the second clause of section 5110 of the Revised Statutes, which do not allow a discharge to be granted "if the bankrupt has concealed any part of his estate or effects, or any books or writings relating thereto, or has been guilty of any fraud or negligence in the care, custody, or delivery to the assignee of the property belonging to him, at the time of the presentation of his petition and inventory," etc.

I do not stop to criticise the form of the specifications, as the counsel of the bankrupt did not think proper to do so, but accept and consider them as definite charges against one of the bankrupts, Heller, that he *concealed* the books of the firm and writings relating to the estate, and that he has been guilty of fraud or *negligence* in the delivery to the assignee of the property belonging to himself, or his firm, at the time of the presentation of his petition and inventory. It must be borne in mind that the partnership of Heller & Katz is in bankruptcy, and that this is the application of one of the partners, Heller, for his discharge. His right to a discharge depends upon his own acts, and he is in nowise bound by the acts of commission or omission of his former partner, unless he is a party thereto. Hence, in considering the evidence, the inquiry is whether the petitioner—not the several members of the firm—has wilfully concealed the estate, or the books of account, or writings relating thereto, or whether he has been guilty of fraud or negligence in withholding property from the assignee.

The testimony shows that the firm of Heller & Katz became hopelessly insolvent during the year 1877; that judgments to a large amount were obtained against it; and that all its available assets were sold by the sheriff of the county of Essex, in the month of October of that year, to satisfy the executions issued thereon. The partners ceased business on their own account after that time, but continued for some months afterwards to carry on the business as the agents of their largest execution creditors, who were the two brothers of the copartner, Katz.

Heller was employed there, with a weekly allowance for his services; but after awhile, deeming his compensation too small for the work done, he withdrew, leaving all the books and papers of the old firm in the possession and under the control of Katz.

An involuntary petition in bankruptcy was filed against the partnership in April, 1878. An adjudication was ordered and entered, but no assignee was appointed until July, 1879. On two different occasions afterwards, the assignee inquired of the bankrupt Heller for the books, writings, and papers of the late firm, and was told by Heller that he knew nothing about them; that he had never had the possession or control of them; and that everything belonging to the partnership had been left in the hands of the other partner, Katz. Not only have the opposing creditors failed to show that this statement was not true, but other evidence, put in by them, corroborates it. It would seem to be a singular perversion of language to hold that such conduct proves concealment. It proves quite the reverse. Considering this same specification in *Hammond v. Coolidge*, 3 N. B. R. 275, Judge Lowell says:

"The concealment of the books from the assignee does involve the question of intent. If the books were accidentally lost, before the bankruptcy, there can have been no such concealment. If they were not lost, but within the control of the defendants, and not given up on demand, with intent to prevent the assignee from obtaining them, but their existence denied, the charge is sustained."

Here their existence is not denied, but admitted. They were not within the control of the petitioning bankrupt. They were held by his late partner, Katz, and there was no evidence tending to prove that this bankrupt attempted to mislead the assignee, either as to their existence or where they were to be found. And so in regard to the remaining question of fraud and negligence in not delivering property to the assignee. The testimony under this specification had reference to the books of account. Whether the legislature meant to include them in the word "property," as used in the section of the act, is questionable; but even if it did, the charge is not sustained against one partner by proof that another partner refused or neglected to surrender them on demand.

The certificate of discharge will be signed.

*In re FREY and others, Bankrupts.**(District Court, S. D. New York. August 10, 1881.)*1. **BANKRUPTCY—BOOKS OF ACCOUNT.**

Where the objection to a bankrupt's discharge goes to the manner in which his books were kept, and to imperfections and omissions therein, the particular irregularities or omissions must be definitely specified to entitle them to consideration.

2. **SAME—SAME.**

If, from such books as were kept by the bankrupt, his financial condition and an intelligible account of his business can be ascertained with substantial accuracy, the requirements of the bankrupt law have been complied with.

In Bankruptcy. Final hearing upon specifications and proofs in opposition to bankrupts' discharge.

*M. H. Regensberger*, for bankrupts.

*T. H. Borowsky*, for opposing creditors,

BROWN, D. J. The bankrupts composed the firm of Frey Brothers & Co., carrying on the business of manufacturing and selling cigars, tobacco, etc., in the city of New York. They had a store in Vesey street, where they sold their goods, and a manufactory in another part of the city. On April 28, 1876, they made a voluntary assignment of their property to Charles Loeb, a brother-in-law of J. L. Haas, one of the firm, in trust for the equal benefit of their creditors. About June 28, 1876, a petition, by certain of their creditors, was filed against the firm, upon which they were subsequently adjudged bankrupts, and an assignee was subsequently appointed, to whom, after a long-contested suit in equity, resulting in setting aside the prior voluntary assignment, Loeb transferred what then remained in his hands of the bankrupts' effects. The specifications filed in opposition to the bankrupts' discharge state 14 grounds of objection, upon which a great mass of testimony has been taken.

The first objection, that the bankrupts failed to transmit a schedule of creditors, and a verified inventory, etc., in the form and manner required by section 5030, is obviated by their subsequent filing of those schedules, which is certified to by the register.

The second objection, that the assets do not equal 30 per cent.; that no assent of creditors has been obtained; and the fourteenth objection, that the debtors made a voluntary assignment as above stated,—are neither of them valid objections to a discharge in involuntary bankruptcy such as this. Sections 5112a, 5021.

The third objection is that Jacob L. Haas, one of the bankrupts, swore falsely upon his examination, at the instance of the assignee,

on August 3, 1877, concerning the disposition of certain tobacco said to have been consigned to Beadles, Wood & Co., of New Orleans. This examination was three years prior to this proceeding for discharge. The examination was never read over or signed by the bankrupt. The counsel for the creditors, in the course of these proceedings, sought to compel the debtor to sign the old examination for the purpose of using it, as it stood, as evidence upon this proceeding. On examining the former testimony, which was originally taken by a stenographer, the debtor alleged that there were inaccuracies and errors in taking or transcribing it, and refused to sign it. Upon request of the counsel for the opposing creditors the matter was certified to the court, and, upon hearing before Judge Choate, this court, in January, 1881, declined to make any order requiring the debtor to sign the paper presented as his former testimony. This former deposition, not having been read to or signed by the debtor, was manifestly incomplete, and not of itself competent evidence upon this proceeding, in which the rules of evidence are the same as in ordinary trials. *In re Van Buren*, 2 FED. REP. 643, 649. No other evidence than this unsigned and incomplete deposition was offered to sustain the charge of previous false testimony; and, as this deposition was rightly rejected, the third objection is overruled as not sustained by any competent evidence.

The fourth, fifth, ninth, and tenth objections allege a fraudulent concealment, or fraudulent gift or transfer, of property, through shipments of tobacco, in February and March, 1876, to Beadles, Wood & Co., of New Orleans, and Zacharias & Co., of Chicago. The charge of an attempt at concealment or fraud in those shipments seems to have been based upon failure to find any accounts opened with those firms in the ledger or journal. The evidence shows, however, that these shipments were on consignment, and were entered not only on the United States revenue book, kept by the bankrupts, but in special consignment books kept with those firms. The remittances received from each firm, on account of the consigned goods, were duly entered on the cash-book, and the corresponding entries, under the head of "merchandise," were made in the journal and ledger, as parts of various aggregate entries from the cash-book, as pointed out by Mr. Haas in his testimony. These entries seem to be inconsistent with the theory of either concealment or fraud, nor do I find any sufficient evidence to sustain these charges.

The sixth and seventh objections allege concealment of books and papers, negligence in the custody of them, as well as false and

fraudulent entries therein, specially with reference to the alleged shipments of Beadles, Wood & Co., above referred to. But I fail to find any evidence sufficient to sustain either of these charges. Mr. Haas swears to the correctness of the entries; no one contradicts him; and the opposing creditors did not procure the testimony of either Harmon or any member of the firm of Beadles, Wood & Co., by whom they could most easily have proved the falsity of these entries, if fictitious. All the bankrupts' books and papers legally passed into the custody of their voluntary assignee; some were confessedly lost in subsequent legal proceedings without their fault; and I do not find any evidence of the firm's retention of any of them, or of negligence in keeping or turning them over.

The eighth objection charges fraudulent payments, gifts, and transfers, to the amount of \$74,000, to Lagowitz & Co. These payments are alleged to have been made by checks, which were not put in evidence, and were proved only by the very imperfect evidence of the stubs of the check-book, which bore on each the word "exchange," or "exch." Mr. Haas testified that they were all given in exchange for checks or cash to the same amount received by Lagowitz & Co. A bundle of such checks of Lagowitz & Co. was produced on the hearing and offered for examination. I find many of them noted on the deposit side of the check-book, extending down to near the time of failure. This charge is not, therefore, sustained. Nor do I find any evidence of any fraudulent payment to Loeb & Co., as further charged in this same objection; nor that the claims proved by Lagowitz & Co. and by L. Haas are either false or fictitious, as charged by the eleventh objection.

The twelfth objection alleges that the bankrupts did not keep proper books of account, but kept them so carelessly and incorrectly, so far as the bulk of their transactions are concerned, that said books are utterly incapable of explaining the manner in which their business was conducted; that there is little connection between the cash-book, check-book, and bills-payable book; that much money was received of which there is to trace, and that the bulk of the payments for bills payable from January 1, 1876, to April, 1876, when they failed, are inexplicable; that no stock-book was kept; that checks were drawn not traceable in the cash-book or elsewhere; that it is impossible to balance the books, or ascertain from them a true statement or record as to what disposition the bankrupts made of their property between January and April, 1876.

The evidence shows that the books were kept by double entry;



that an invoice-book, which dispenses with the need of a stock-book, (*In re White*, 2 N. B. R. 590,) was properly kept, and that all the other usual or necessary books of account were also kept. The objection being, therefore, to the *manner* in which the books were kept, and to imperfections or omissions therein, general objections like those above stated are not sufficient. The particular irregularities or omissions must be pointed out in the specifications to entitle them to be considered. *In re Littlefield*, 3 N.B.R. 57; *Hammond v. Coolidge*, Id. 273.

The specifications under this objection accordingly state the following particular errors or omissions, which will be considered *seriatim*.

(a) No accounts in ledger or sales-book of the consignments to Beadles, Wood & Co. and to Zacharias & Co., or of the pledge of goods to De Fries upon a loan of \$5,556.60. The consignments above referred to were entered in special consignment books, as already observed, and, so far as remittances were received on account of them, the proper debits were made in the cash-book, and the due counter entries were made in the journal and ledger under the merchandise account, corresponding with the receipts of cash entered in the cash-book. Nothing else was essential, so far as I can perceive, to the full understanding of these transactions. The entries, taken all together, showed the property consigned, its estimated value, the receipts from it up to the time of failure, and that sales by the consignees remained at the time of the assignment to be still accounted for. It would be time enough to enter in the sales-book when returns of sales were received. The testimony of the expert that there were no entries in relation to those consignments in the journal or ledger is shown to be incorrect. The fact that the entries were in aggregates, along with other items from the cash-book, does not exonerate him from the charge of having testified without sufficient examination, as the mode of entering by aggregates the transactions of several days from the cash-book was manifest upon the face of the books. As the transaction with Beadles, Wood & Co. was one of the main subjects of inquiry, and most strongly insisted on in several different objections, this error of the expert in so important a particular greatly weakens the force of all his testimony about the books.

As no particular mode or system of keeping books is required, (*In re Solomon*, 2 N. B. R. 287; *In re Newman*, 3 Ben. 20; *In re Townsend*, 2 FED. REP. 565,) it is optional with a merchant whether he will make his books few or many, general or special, and whether he will enter consignments in a general ledger or in special books for

that class of accounts. The same remarks apply to the loan of \$5,556.60 from De Fries, and the pledge of warehouse certificates to secure it. Due entry was made of the money received in the cash-book, while the goods represented by warehouse certificates pledged were entered, as Mr. Haas believed, in a separate memorandum book. There was no entry in the other usual books, because, as he says, it was not necessary; on payment of the loan and the credit of cash so paid in the cash account the books would balance. The full statement of the merchandise pledged to De Fries and of the loan upon it, which was contained in the schedules filed not long after in connection with the voluntary assignment on June 6, 1876, which have been put in evidence, shows conclusively that no concealment was either made or intended, as is charged by the thirteenth objection.

The fact that such consignments and hypothecations of goods were exceptional transactions, not in the usual course of the business of the bankrupts, is perhaps a sufficient explanation of their not making the original entries of the merchandise consigned or pledged in their usual books, but in special books used for these purposes. As such special books afford all necessary information to understand the transactions, they cannot be held to be not "proper books of account" within the meaning of the bankrupt law.

(b) On the argument special objection was also made to the omission to enter in the cash-book or in any other book except the check-book, the numerous checks appearing from the stubs to have been given to Lagowitz & Co., above referred to, amounting in the aggregate to about \$74,000. But as these were all "exchange" checks, as testified to by Mr. Haas, and so noted, mostly, on the stubs themselves, I see no reason to doubt the correctness of his testimony that "no further entry of them (even had payment of the checks been proved) was either necessary or proper." They did not affect the business any more than the cashier's giving bills from his drawer in exchange for a check to the same amount, for the accommodation of a friend, would have done. These exchanges were doubtless resorted to simply for the benefit of an apparent temporary increased balance in their bank account while the checks were going through the clearing-house, equivalent to one or two days' credit in bank. The entries in the check-book were, I think, all that were needed. If, in fact, any further entries of them would have been proper, their omission cannot be deemed material, as they did not affect the business or financial condition of the debtors. *In re Batchelder*, 3 N. B. R. 150.

(c) These considerations are a sufficient answer, also, to the general charge that the check-book and cash-book and bills-payable book do not correspond. Mr. Haas, one of the bankrupts, who kept the books and was himself an expert, testified that the one was not an index to the other. Nor does any reason appear why all receipts of cash or checks, or even those received from the payment of business debts, should be necessarily deposited in bank. They are often paid out directly on account of business obligations, and properly so. Checks may also be given out in exchange, or in making change, so as not to be necessarily entered in the cash-book. Perfect correspondence is not, therefore, to be looked for between the cash-book and the check-book on either side. Though a check-book may be made to serve the purposes of a cash-book, it is not usually so. Ordinarily, it presents but an incidental and subordinate account, viz.: an account of the particular drafts upon and deposits in the bank for which it is used. So, also, as between the cash-book and bills-payable book. A note or bill payable, paid otherwise than in cash or check, need not go in the cash account. An accommodation note, entered in the bills-payable book when issued, would have no corresponding entry at all upon the cash-book if never negotiated; nor, if negotiated, would the corresponding entry in the cash-book be made until the date of the receipt of money on it.

The expert mentions seven items between January and April, 1876, charged to bills-payable as paid in the cash-book, and not entered in the bills-payable book, amounting altogether to about \$4,000. As the cash-book is the more important of the two, these omissions, if in fact omitted from the other book, would seem to be of little importance; but as the bills-payable book was lost by the creditor's counsel prior to these proceedings, and the extracts from it by the expert were confessedly partial and incomplete, Mr. Haas had no opportunity to contradict or explain the alleged omissions by reference to the book itself. These omissions were not pointed out in the specifications. Five of the seven were prior to March 1, 1876, when, as Mr. Haas testifies, the books actually balanced. The due counter entries as to these five must, therefore, have been somewhere made. The expert was not recalled to deny or qualify Mr. Haas' testimony that the books balanced to that date. There were no omissions, therefore, affecting the state of the business as to the five items prior to March 1st; and it cannot be assumed that the two subsequent alleged omissions were of any different character.

(d) "Accommodation paper to the amount of about \$32,000 paid,

and entered only upon the cash-book and bills-payable book, and not otherwise traceable." The expert Muller testifies that this paper was accommodation, from the fact that it does not appear to have been given for merchandise, and no other entries appear than those above mentioned. That this was accommodation paper seems not to be denied; and, assuming this to be so, it does not appear, nor do I understand the expert to testify or intimate, that any further entries were necessary. The general charge that much money was received by the bankrupts which could not be traced, is contradicted by the expert.

(e) "The purchase between January 1, 1876, and May 1, 1876, of \$55,000 worth of goods, and no account of the disposition thereof." All these purchases are made out from the invoice-book, which the expert says was properly kept. And in answer to the question whether he could explain from the books how they were disposed of, he answered "Yes." The voluntary assignment conveyed to the assignee whatever was not then disposed of. No deficiency is pointed out or intimated in the testimony. The entries in the consignment books supply, I presume, the supposed deficiencies referred to in this specification,

(f) "Large quantities of tobacco disposed of and not entered on the United States revenue book." There is no evidence that the book here referred to is one of the "books of account" referred to by the bankrupt act; nor do I find any evidence of omission of any goods which ought to have been entered in it.

(g) "That temporary loans and exchange checks are entered in the cash-book on either side as bills payable." If so entered, it would be immaterial. Such entries on temporary loans would be, evidently, proper enough; as to exchange checks, such entries would be needless, as above held, but do no harm. Previous objection was made that they were *not* entered in the cash-book. I do not find evidence, however, of the entries here complained of.

(h) "Numerous erasures in the cash and other books." But very few of these were specified in the testimony, and none of any comparative importance. Erasures are immaterial unless made in fraud, (*In re Antisdel*, 18 N. B. R. 289,) of which there is here no reasonable ground of suspicion, considering the comparative unimportance of the entries.

(i) "Impossible to balance the books, or to ascertain from them a true statement of the disposition of the bankrupts' property." The latter objection has been considered above. Mr. Haas testified that

the books could be balanced, and that they were balanced, in fact, on March 1, 1876, the month preceding the failure. Muller testified that they could not be balanced, but when asked why they could not be, said, "I cannot tell; there must be a mistake, or mistakes, in the books, which I did not take the trouble to find out;" nor does he intimate the amount of the discrepancy, whether material or immaterial.

In the cross-examination of Haas, the only defect or omission pointed out as needed to make the books balance, was the omission to enter in the cash-book \$500 paid to L. Cohn & Co., for which their receipt was taken in the receipt-book, April 12, 1876. The stub of the check put in evidence shows, "April 10, L. Cohn, expense account, \$500." This omission was obviously a casual one, and is not specified as a ground of objection in the specifications.

These objections have been considered with more particularity, perhaps, than was requisite. Not a single transaction was disclosed in the voluminous evidence which does not appear, in some form, upon the books of the firm. This circumstance, considering the industry and perseverance of counsel for the opposing creditors, affords a strong presumption that no concealment or fraud was intended.

The intricate and highly artificial system of book-keeping by double entry admits of many diverse modes of entering the same business transaction, and has given rise to standards of criticism among experts which the bankrupt act does not demand.

The standard in the mind of Mr. Muller, the expert in behalf of creditors in this case, who testified that these books were not properly kept, may be seen from his statement that a check-book is not properly kept if the checks are not numbered, or if more than one check is drawn against a single stub; that no erasure in a ledger is justifiable; and if an error be made in carrying out the figures it must be corrected in no other way than by a cross entry of "error" to an amount sufficient to make the needed correction; and that it is a very suspicious circumstance if entries are found in one book and not in another, although he admits, as an expert, that "the entry in one book even affords to his mind the conclusion that no concealment was intended."

It is manifest that the standard of this witness is not the standard of the bankrupt act. The object of the clause requiring "proper books of account" is primarily to secure the keeping of the necessary books to show the course and condition of a merchant's business; and the courts have held that it further requires that such books be

kept properly, having reference to the purposes of the act, viz., the ascertainment of all the debtor's proper assets and liabilities, and the distribution of his property among his *bona fide* creditors. This requirement is not incompatible with casual and unintentional mistakes. *In re White*, 2 N. B. R. 590; *In re Burgess*, 3 N. B. R. 196; *In re Jewett*, 3 FED. REP. 503.

It is sufficient if the entries are enough to determine, with substantial accuracy, the real condition of the debtor's affairs, and furnish an intelligible account of his business. *In re Solomon*, 2 N. B. R. 287, *per Grier, J.*; *In re Archenbrow*, 12 N. B. R. 17; *In re Antisdel*, 18 N. B. R. 289. It is not the office of book-keeping to furnish a complete historical record and a full explanation of all business transactions, but only brief memoranda or entries concerning them, and they often require a reference to other writings, documents, letters, or contracts, or to facts within the knowledge of the parties concerned, for their full explanation or comprehension. *In re Townsend*, 2 FED. REP. 559, 565; *In re Brockway*, 7 N. B. R. 598.

Additional writings are recognized by the bankrupt act, which requires their presentation and delivery to the assignee, (sections 5044, 5110, 5132;) and the bankrupt himself may be cited and examined under oath whenever required for the further elucidation of his accounts. Section 5086. These provisions would be needless if "proper books of account" alone would furnish full and complete knowledge of the debtor's affairs. To keep "proper books of account" does not, therefore, require the entry of all the details necessary to a full understanding of the matters referred to by the entries. Without such details brief memoranda, when sufficient to exhibit the debtor's "financial condition and course of business," are all that is required. The books, moreover, are not required to be kept always posted or balanced, nor need the entries be kept up daily. *In re George*, 1 Low. 409. And if casual omissions are not a sufficient objection, still less can books be held to be improperly kept, when, as here, a few transactions complained of, though not entered in all the books, are all entered in at least some of them, and thereby the books themselves afford means for their own rectification.

Upon balancing the books for the short period of the debtors' business after March 1st, these partial omissions would have been observed and doubtless corrected. The expert seems not to have made any endeavor to supply the omissions which the books themselves afforded means of supplying. I do not understand him to testify that he could not ascertain from the books, with substantial accuracy,

the financial condition of the debtors, nor, with the aid of the consignment books, a proper account of the stock and previous course of business.

The discharge should, therefore, be granted.

### *In re BIGNALL, Bankrupt.*

(*District Court, E. D. Missouri.* November 9, 1881.

1. **BANKRUPTCY—ATTORNEY'S FEES—ACT OF 1875—GENERAL ORDER OF THE SUPREME COURT.**

An attorney's fee of \$20 is all that can be allowed for obtaining an involuntary adjudication in bankruptcy.

2. **SAME—SAME.**

Where the assignee of a bankrupt had made an agreement with attorneys whereby they were to prosecute certain cases, and were to receive, if successful, such sum for their services as the court might allow, and they had thereupon instituted suits, gone to some expense and great trouble, and recovered large sums which otherwise would have been lost to the creditors of the bankrupt, an allowance of 20 per cent. upon the amounts recovered *held* reasonable

#### **In Bankruptcy. Petition for counsel fees.**

The question here arose upon two petitions of the firm of Taylor & Pollard, attorneys at law, asking for the allowance of certain fees, and the report of the register in bankruptcy, to whom the matter was referred. The register decided that said firm were entitled to a fee of \$750 for services as attorneys, on behalf of the petitioning creditors, in obtaining the adjudication of M. C. Bignall as a bankrupt, and to 20 per cent. of the amounts recovered in the suits referred to in the opinion of the court, and so reported. The register's report was excepted to by the Gould Manufacturing Company and S. B. Gould, creditors, who had sought to obtain a fraudulent preference by buying up claims against the bankrupt's estate.

*George M. Stewart*, for petitioners.

*J. M. & C. H. Krum*, for excepting creditors.

TREAT, D. J. I have considered the exceptions to the register's report in this case, and as the attorneys were anxious to have the matter determined before 3 o'clock to-day, I shall announce my conclusions. The attorneys for the petitioning creditors asked for an allowance in the matter, for their services, of the sum of \$1,000. The register, under all the facts and circumstances of the case, allowed the attorneys what he considered a reasonable sum, namely, the sum of \$750. It is said, from the facts appearing with regard to the matter, that but for the proceedings in bankruptcy the creditors

would have practically received nothing. The supreme court of the United States, under the general orders in bankruptcy, especially Nos. 3 and 39, tried to restrict these matters, so far as a petitioning creditor was concerned, to the ordinary taxable costs in the courts, as stated in the general order, as "in cases of equity." The practice of the district courts had been otherwise. They held that where some creditors proceeded against an estate, and spent money for the benefit of the creditors generally, the general fund ought to be amenable for the result, inasmuch as all the creditors would share in the benefits of the controversy. But the supreme court of the United States, under the act of 1875, concluded to stop that. The exceptions as to that allowance by the register will, therefore, be sustained, except as to the sum of \$20, which is the taxable fee.

Now, as to the other matter, what is properly allowable? It seems that the assignee in this case—the original assignee and his successor, the original assignee having resigned—made an agreement with the attorneys in this matter whereby they might pursue this litigation, and recover, if possible, the amounts in dispute; they to receive, if successful, such sum as the court might deem fair compensation for them. No sum was specified. Litigation ensued. The attorneys had to bear certain expenses in the northern district of New York, and had to go backward and forward in the investigation of the same. The result was that they recovered the sum of seventeen thousand and odd dollars in one suit, and in another direction, where there was less labor and trouble, they recovered the sum of \$5,300. Now, what is a fair compensation under the circumstances? We have the opinions of a great many of the attorneys of the bar with regard to such matters. The register reports that he thinks this court ought to follow the precedent of the bar, which I think is more honored in the breach than in the observance. I think that the best interests as well as the ethics of the profession require that attorneys shall not do that which was denounced by the common law—speculate in the trial of causes. I have no sympathy for any rule which permits such practice. The parties in the case, or rather the assignee, should have applied to the court for permission to enter into a contract. Nothing of the kind was done. The services, however, have been performed and the money recovered. The party objecting to the allowance in this matter occupies a peculiar relation. I am sorry his attorney is not here. Nearly all the funds of this bankrupt estate would have been absorbed through the instrumentality of this particular party. Being pursued in the United States courts by the



assignee on account of the matter, he bought up all the accounts. After a fierce litigation for over a year, having bought up these claims and finding he must at last meet the result of the litigation, to-wit, a judgment for the entire amount received through his fraudulent contrivances, he now comes in and objects to an allowance of anything in the way of fees for the services which compelled him to answer for the fraud perpetrated on all the creditors generally. The case is peculiar in that aspect, and I mention it merely that this action shall not be considered as a precedent in these matters. The circumstances of this case and its peculiar character must be considered, together with the fact that the party objecting is a fraudulent creditor, who was pursued to the point where he had to surrender to a judgment, in the mean time buying up claims, and finally making a compromise, which, for a long time, I hesitated to permit. He wishes to come in here as a creditor under the bankrupt act, and share in the dividends under these contrivances. As stated by himself, in the argument, he has nineteen-twentieths of the claims, and wishes to avoid paying any expenses. Without indorsing the mode of proceeding with regard to the matter, I merely hold that under the special circumstances of this case the report of the register as to this allowance will be affirmed; or, to put it in precise form, the exceptions thereto will be overruled.

As to the allowance under the general orders in bankruptcy, in consequence of the act of 1875 the sum of \$750 will be reduced to \$20.

As to the other amount, ordinarily, I would not allow it; but when a party comes in who is guilty of fraud and asks that he may take nineteen-twentieths of the estate, and objects to an allowance for the very services which compelled him to disgorge, I do not think he stands in a very favorable attitude towards the court.

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BATE REFRIGERATING Co. v. GILLETT and others, impleaded, etc.

(*Circuit Court, D. New Jersey. September 13, 1881.*)

1. LETTERS PATENT—PRESERVING MEATS.

Letters patent No. 197,314, granted November 20, 1877, for improvement in processes for preserving meats during transportation and storage, consisting in enveloping the meat in a covering of fibrous or woven material, and subjecting it to a continuous current of air of a suitable temperature, are not invalid for want of novelty.

In Equity.

*Dickerson & Dickerson*, for complainant.

*Chas. H. Winfield*, for defendants.

NIXON, D. J. This bill is filed against the defendants for the infringement of letters patent No. 197,314, dated November 20, 1877, for "improvement in processes for preserving meats during transportation and storage."

The answer of the defendants sets up various defences to the complaint: (1) It denies the novelty of the complainant's patent; (2) it denies infringement; (3) it alleges a prior use for more than two years; (4) that the claim is too broad, embracing more than the patentee's invention; and (5) that the alleged improvement consists of a mere aggregation of operations, producing no new result. But the testimony largely turns upon the question of novelty.

The patent is for a process, and has reference to the transportation and storage of meats in large pieces, either by railway or steamer. The patentee states in his specifications that the object of the invention is to prevent the discoloration of the surface of the meat and the taint to its external portions, which, by the methods hitherto adopted for preserving the same during transportation, frequently occurs. The patent is a combination, comprising two elements or constituents: (1) Enveloping the meats in a covering of fibrous or woven material; and (2) subjecting the same to the action of a continuous current of air of suitably low or regulated temperature. Neither was new. Meats had long before been covered to keep them from dirt or dust in transportation; and refrigerators had been used to subject them to the action of currents of chilled air, and thus hindering decay. But the patentee claims that a new and useful result was found to proceed from the combination, to-wit: preserving the natural color or complexion of the meat during transportation, and thus having, at the end of the trip, a more merchantable article.

The theory on which the patent rests is that fibrous or woven material has the power of absorbing from the atmosphere the germs which provoke incipient decay on the surface of the meat. It acts as a filter, straining from the air the animalcula or microscopic particles that tend to discolor the meat or cause putrefaction. The air is supposed to be full of these spores, so minute that they have never been seen or detected with the microscope, and yet so numerous that 3,200,000,000 are capable of being generated on a single square inch of the surface of decaying meat.

Whether these speculations of the scientists be true or not; whether the preservation of the bloom or natural color of the meat arises

from the protection against atmospheric germs that is afforded by the fibrous material with which it is covered, or from some other cause,— I think the weight of the evidence is that such a result, in fact, follows, and that the combination of the complainant's patent was the first which revealed it to the public. I have been led to this conclusion from the general testimony, and more particularly from the experiment which was made in Brooklyn during the progress of the case, and which has been detailed by Prof. Morton in the complainant's record, p. 182, as follows:

“On Thursday, February 19th, I went over to Brooklyn to the store of Messrs. Coker Brothers, 635 and 637 Fulton street. I there found two hind-quarters of beef which I was told were from the same animal and the carcass of a sheep. These were photographed by Mr. Landy for the purpose of retaining a record of their similar condition. One of them was then covered with burlaps, or cotton cloth, (I have a specimen of that at home,) and a portion of the sheep's carcass—that is, the middle part—was likewise covered with the same sort of material. The three pieces were then hung in a refrigerator, consisting of a box with a partition on one side filled with ice, in which refrigerator they were locked. When the covering was put on I sealed a string, passing through the covering and the meat in each case, in such a way as would render it impossible to remove it without breaking the seal. I retained the seal and also the key of the ice-box, there being merely an opening into the ice compartment by which ice could be put in. On March 8th I again went to the same place, opened the safe, had the meat taken out, examined the seals, found them intact, had the coverings stripped off, and then compared the various pieces of meat. Of the two quarters of beef, that which had been covered with burlaps was bright and fresh, and showed no change of color or clamminess on its surface. That which was uncovered showed decided darkening in many parts, and was generally moist and clammy to the touch, and showed in many places a white deposit resembling mould. The sheep's carcass showed in the uncovered portion a decided change of color in parts, and was also there moist, while in the covered part it appeared exactly as when it was placed in the box. \* \* \* On rubbing the finger upon the uncovered beef I noticed a slight musty smell, which was not perceived in a similar test of the covered beef.”

This statement of the experiment and of the result is fully confirmed by the testimony of David Levy, the butcher who slaughtered the bullock, and of Edward and W. R. Coker, on whose premises the trial took place; and it seems to be conclusive that the new and useful results claimed by the patentee do follow the covering of the meat with burlaps or cotton cloth, under the conditions set forth in the patent.

With such a construction of the patent not much attention need be given to the question of infringement.

The inventor, referring, in his specifications, to the practice of his invention, says that he provides any suitable chill-room or refrigerating chamber within or through which a current of air is produced. Such current may be either from the external atmosphere through the chill-room and thence out again, or the room or chamber may be closed against access of the external atmosphere, and its contained air be caused to pass, over and over again, through a suitable ice-box or equivalent means of reducing the temperature thereof; and this causing the air to pass repeatedly through the said ice-box, or the like, may be either by a change in the density of the air, as in the well-known Lyman refrigerator, or the circulation of the air through the ice-box may be produced by means of a fan-blower.

In the defendant's apparatus, the refrigeration is accomplished by a series of pipes arranged around the walls of the refrigerating chamber, extending nearly to the ceiling, through which the brine is mechanically forced. The air, being chilled by the pipes, flows out to the center of the chamber, where it comes in contact with the meat, and, being warmed by it, rises and flows to the sides of the box, where it is again cooled by the pipes. The meat, covered with burlaps or with cotton goods, like shirting, is exposed to this continuous current of air.

It does not require an expert to prove that such a process of cooling, with such a covering of the meat to be transported, falls within the claim of the complainant's patent.

There must be a decree against the defendants for the infringement, and the usual reference for an account.

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### SELDEN and others v. STOCKWELL SELF-LIGHTING GAS-BURNER Co.

(Circuit Court, S. D. New York. September 5, 1881.)

#### 1. LETTERS PATENT—POCKET-LIGHTING DEVICE.

The first five claims of reissue No. 8,490, granted to George Selden, November 12, 1878, for an improvement in pocket-lighting devices, *held* to be infringed by the structure of the defendant, the differences between the two structures being merely formal.

#### 2. SAME—ASSIGNMENTS.

Section 4895 of the Revised Statutes, which provides that patents may be granted and issued or reissued to the assignee of the inventor or discoverer, does not require that the assignee shall be the immediate assignee of the inventor.

3. SAME—SAME.

If the assignment which divested the inventor of his interest in a patent was made before July 8, 1870, the case falls within the exception to section 4895 of the Revised Statutes.

4. REISSUES.

A patent is not void because it is a reissue of a reissue.

5. SAME—COMMISSIONER.

The commissioner's decision upon an application which sets forth that the surrendered patent was inoperative by reason of a defective specification is conclusive.

6. SURRENDERS—REISSUES FOR SEPARATE PARTS.

Where the original specification described a circular case for a pocket-lighting device, and an extended tube case for lighting at a height, *held* that, upon the surrender of the original patent, reissues for each form of apparatus, as distinct and separate parts of the thing patented, are valid.

*Edwin H. Brown*, for plaintiffs.

*George Hill*, for defendant.

BLATCHFORD, C. J. This suit is brought on two patents. The first one is reissue No. 8,490, granted November 12, 1878, to George Selden, one of the plaintiffs, for an "improvement in pocket lighting devices." The original patent, No. 50,860, was granted November 7, 1865, to Philos B. Tyler, William M. Chandler, and L. F. Standish, and was surrendered and reissued October 23, 1877, to said Selden, in two divisions—No. 7,927, division A, and No. 7,928, division B. No. 8,490 was granted on the surrender of No. 7,927. The specification of No. 8,490 is signed by said Selden, and not by Tyler, Chandler, and Standish, and was sworn to by Selden, and by no one else. It is as follows:

"Be it known, that Philos B. Tyler, William M. Chandler, and L. F. Standish did invent certain new and useful improvements in pocket lighting devices, of which the following is a full, clear, and exact description; reference being had to the accompanying drawings making part of this specification, in which figure 1 is a side elevation of the lighter, figure 2 represents the same in sections, figure 3 is a rear view of a portion of one of the repeating matches employed, and figure 4 represents a longitudinal section through the same. Similar letters of reference denote corresponding parts wherever used. The invention relates to a novel lighter for carrying in the pocket, consisting of a case or shell adapted to enclose and protect a continuous or repeating match, and provided with appliances permanently attached to it for feeding and igniting the match, as hereinafter explained. In the accompanying drawings, *a* *a'* represents a case or shell made in the form of a shallow box, one side or plate, *a*, thereof being provided on its edge with a flange or rim, *a'*, forming a chamber or magazine for containing the repeating match or tape, which, when in place, is covered by a hinged or removable cover, *a'*. The plate or side, *a*, has a pin or arbor, *b*, secured to it, arranged about central to the magazine or chamber, and projecting through a perforation in

the cover,  $a^1$ ; and a hook,  $c$ , pivoted on the cover,  $a^1$ , and engaging with the projecting end of the pin or arbor,  $b$ , serves to hold the cover in place. Figures 1 and 2 of the drawing show a convenient form of the case for general use, representing it as approximating a circular form, or rather that of a short cylinder, provided with what may be termed an 'eccentric extension,' and an opening or outlet through the same at  $e$ , through which the repeating match is fed outward, as desired. One wall of this outlet,  $e$ , extends slightly beyond the other, and forms a projecting lip or nose-piece,  $d$ , over which the repeating match passes as it is fed outward, said lip or nose-piece serving to support the match directly against the action of the igniting device. At a point near the outlet passage,  $e$ , the case or shell,  $a$ , is provided with a toothed wheel,  $f$ , or equivalent device, for feeding the match outward, the shaft of said wheel being journaled in the side walls or plates of the case or outlet passage, as shown at  $f^1$ . On the inner side of the flange or rim,  $a^2$ , opposite to the wheel,  $f$ , is secured a spring,  $g$ , which overhangs the feed wheel,  $f$ , and serves as a guiding apron for holding the repeating match or tape in contact with the wheel, insuring the endwise or feeding movement of said match or tape between the two when the wheel is rotated. Directly over the nose-piece,  $d$ , is a device,  $h$ , for igniting the repeating match, consisting of an angular lip or projection on a vibrating arm,  $h^1$ , which, at its rear end, is rigidly connected with a rock shaft or pin having its bearings in the case,  $a$ , or walls,  $a^2$ , and provided with a handle or thumb-piece on its outer end, outside of the case or shell, by means of which the igniting device,  $h$ , may be operated for igniting the match. The vibrating arm,  $h^1$ , is enclosed and protected by being placed within a compartment or chamber,  $i$ , as shown. The lighter case thus constructed is designed to enclose and protect a match composed of a strip of paper or tape,  $k$ , provided either with a continuous strip of igniting material, or with such material arranged in shots or pellets at regular intervals in its length, as shown at  $m$ , figures 3 and 4, and which, for adapting it to be placed in compact shape in the case,  $a$ , is rolled up, as shown in figure 2. Any suitable kind or preparation of igniting material may be used upon the tape or strip of paper, and, where it is used in connection with a tape or wick of other material than paper, said wick or tape may be saturated with stearine or other suitable material, adapting it to be readily ignited by the igniting pellets or strip. In operation the wick or tape is fed outward by means of the wheel,  $f$ , until a pellet or portion of igniting material rests on the nose-piece,  $d$ , when it is ignited by the vibration of the arm,  $h^1$ , and igniting device,  $h$ , and in turn serves to ignite the wick or tape, which may then be used for any purpose to which it is applicable. The wick will continue to burn as long as any portion of it projects beyond the outlet passage,  $e$ , or nose-piece,  $d$ , and may be fed outward and allowed to burn as long as required, when, by withdrawing it, or allowing it to burn until all that projects is consumed, the air will be excluded from the remaining portion, and the fire will be extinguished. The operation may be repeated until the entire repeating match is consumed, when, by removing the cover,  $a^1$ , or opening the case,  $a$ , a new match or tape may be inserted. Having now described the invention of the said Tyler, Chandler, and Standish, I would state that I do not wish to be limited to any particular igniting material in the manufacture

of the repeating match, nor to the use of a tape or wick saturated with stearine, as any suitable material may be employed, both for igniting the wick or tape, and saturating the same, such as will adapt it to be readily ignited; nor do I wish to be limited to the specific form of case shown, nor to the particular construction and arrangement of the devices for feeding and igniting the repeating match; the form and arrangement shown being such, however, as to adapt the lighter to general use, and constituting a convenient and compact form for carrying in the pocket."

The claims involved in this suit are the first five, which are as follows:

"(1) In a pocket lighting device, a magazine, case, or shell for inclosing the strip or coil of repeating match, provided with a lip or nose-piece, projected beyond the outlet opening or passage for the match, and serving to uphold the match against the action of the igniting device. (2) In a pocket lighting device, a magazine, case, or shell for containing a repeating match, provided with a lip or nose-piece, substantially as described, for upholding the match, and an igniting device between which and the lip or nose-piece the match is ignited. (3) In a pocket lighting device, a magazine, case, or shell for containing the strip or coil of repeating match, provided with an outlet, opening, or passage for said match, and a lip or nose-piece projected beyond said outlet on a line parallel, or nearly so, with the line of feed of the match. (4) In a pocket lighting device, a magazine, case, or shell, with a lip or nose-piece for upholding the repeating match against the action of the igniting device, and over which the match is fed outward, in combination with an igniting device arranged parallel, or nearly so, with the duct or passage through which the wick or match passes to be ignited. (5) In a pocket lighting device, the combination of a magazine, case, or shell for enclosing a strip or coil of repeating match; a nose-piece extending beyond the outlet therefor in the magazine, case, or shell; a permanently attached igniter, acting in conjunction with said nose-piece, to effect the ignition of the repeating match; and a device for feeding the repeating match over the nose-piece."

One of the defences set up in the answer is that No. 8,490 is for another and different invention from any covered by or described in No. 50,860, or its drawings or specification. The specification of No. 50,860 was as follows:

"Be it known that we, Philo B. Tyler and William M. Chandler, of Springfield, in the state of Massachusetts, and L. F. Standish, of Chipcopee Falls, in the state of Massachusetts, have invented certain new and useful improvements in friction matches and apparatus for using them, and we do hereby declare that the following is a full, clear, and exact description thereof, reference being had to the accompanying drawings, making part of this specification, in which figure 1 is a face view of a continuous match, figure 2 a like view of a repeating match, figure 3 a longitudinal section of a repeating match, figure 3a another longitudinal section of a repeating match, (both sections drawn on a large scale,) figure 4 a side view, and figure 5 a section of one form of apparatus for using such matches, and figures 6 and 7 like

views of another form of such apparatus. The same letters indicate like points in all the figures. Prior to our said invention matches for producing flame have been made in separate pieces, of some material which, when ignited, would produce a flame; generally, splints of wood, rendered more readily ignitable by having one end coated for a short distance with sulphur, and the extreme end thereof with phosphorus or other substance, which will readily ignite by friction. At each ignition the entire of one such match is either entirely consumed, or, if not entirely consumed, what is left of it is thrown away, and, generally, the modes of keeping and using such matches are attended with inconvenience and danger. The object of our said invention is to form a continuous or repeating match requiring only so much of it to be used as may be required, and then extinguished, and the residue retained for further use, until, after repeated use, the whole is consumed. And our said invention also relates to apparatus for containing and using such continuous or repeating matches. We prepare said continuous or repeating matches by taking a strip, *a*, of paper or tape of any desirable length, and about a quarter of an inch in width, and saturate it with stearine or equivalent combustible substance, which, when ignited, will produce a flame and burn more slowly and steadily than the paper or tape, and, when ignited, will continue to burn with a flame throughout the entire length, unless it be extinguished by some means. For a continuous match, we apply to one surface of the prepared strip, and along the middle portion thereof, as at *b*, sulphur and phosphorus, applying the sulphur first and then the phosphorus; or, instead, other equivalent substance or compound for igniting by friction may be so applied. But, for making what we term a repeating match, instead of applying the sulphur and phosphorus, or equivalent therefor, continuously, we apply it in spots, at equal distances apart, leaving a length of the prepared strip between every two sufficient to make a flame for the required length of time. And, as the material for igniting by friction does not adhere to the surface of the prepared strip with much force, and for that reason would be likely to be rubbed off in making friction upon it to ignite it, a part of our said invention relates to a means of securing such preparation, and consists in puncturing holes, *c*, through the strip, either before or after it has been prepared with the inflammable matter, so that the phosphorus, or equivalent therefor, when applied, will enter such perforations, as at *d*, and become thereby securely connected with the strip, so that it cannot be rubbed off. For the convenient use of our continuous or repeating matches, the strip is to be placed in a case of a circular form, as represented at *e*, the strip being coiled up in the form of a volute, and one side, *f*, of the case being fitted to the circular rim, *g*, so that it can be put on or taken off readily, like the cover of an ordinary snuff-box, or it may be hinged to the rim. The end of the match-strip is pushed out through an opening in the rim, and into and through a tangent nose-piece or beak, *h*, the under part of which is provided with a toothed roller, *i*, the teeth of which act on the under face of the strip, which is borne against the said roller by a slight spring, *j*, so that, by turning the said roller with the finger, the required length of match is pushed out beyond the end of the nose-piece. But instead of turning this roller by the finger, acting on the under part, it may be entirely enclosed in the nose-



piece of the case, and its arbor provided with a thumb and finger-wheel. An instrument which we term the igniter is attached at its rear end to a little arbor mounted on the outer or top plate of the nose-piece, and this arbor is formed outside, with a thumb and finger-piece, *l*, so that it can be turned, and the extreme end of this igniter extends to the outer end of the nose-piece, and is there formed with a slightly projecting lip, *m*, brought to a point or roughened on the lower edge, which bears on the match. The igniter is narrow, so that, when turned to one side the lip lies by the side of the strip, and when the end of the match has been pushed out beyond the nose, it is ignited by giving a slight vibrating motion to the igniter, which carries its pointed or roughened lip across the surface of the match. When the match has been ignited and inflamed, the flame can be continued as long as desired, by pushing out more of the match beyond the nose of the case, for it will only become extinguished when the flame reaches, or rather approaches, the end of the nose, which cuts off the supply of atmospheric air which feeds the flame. The form of case above described is that which we deem best suited for general use; but, for lighting chandeliers, gas-burners, etc., at a height beyond the reach of the hand, we make the case in the form of a straight tube, *n*, into which the match-strip is inserted, the upper end of the tube being provided with a nose-piece, roller, and igniter, in like manner as the case already described. We wish it to be understood that, with reference to the matches, we do not limit ourselves to the use of any special material for the strip, nor for saturating the strip to make it burn with a flame, nor to the kind or preparation of material for igniting by friction. We have named the materials and preparations which we deem best, but, as there are many substances and preparations possessing equivalent properties, any of these may be readily substituted without departing from our said invention, and, in fact, the strip may be prepared so as to be sufficiently inflammable to be ignited by the phosphorus without the use of sulphur. In short, our invention does not relate to the preparation or combination of materials for producing a flame by friction, but to the structure of an inflammable match by which it is rendered continuous or repeating."

The claims were as follows:

"(1) The continuous or equivalent repeating match, composed of a strip of substance which, when ignited, will burn with a flame, combined with the preparation of sulphur and phosphorus, or the equivalent thereof, which will ignite by friction, put on along the whole length, or, as the equivalent thereof, in spots, at given distances apart, along the whole length, substantially as and for the purpose described. (2) Piercing the strip with holes, and applying the material that ignites by friction thereto, to prevent such material from becoming detached therefrom, all substantially as described. (3) In the apparatus for using continuous or repeating matches, the nose-piece or tube through which the match passes, in combination with the vibrating igniter, or the equivalent thereof, substantially as and for the purpose described. (4) In combination with the nose-piece, through which the match passes, the roller, or equivalent thereof, for moving the match, and the igniter, or the equivalent

thereof, as and for the purpose described. (5) In combination, the case for containing the match, the nose-piece, the roller for moving the match, and the igniter, or the equivalents for them, as and for the purpose described."

1. It is provided, by section 4895 of the Revised Statutes, that "patents may be granted and issued or reissued to the assignee of the inventor or discoverer, but the assignment must first be entered of record in the patent-office." Selden was the fourth assignee in succession of the entire interest in the original patent, and was not the immediate assignee of the inventors. The defendant contends that the word "assignee," in the statute, means the immediate assignee, and not the ultimate assignee, and that reissues Nos. 7,927 and 8,490 were invalid because they were granted to Selden, and he was not the immediate assignee of the inventors. This is not the proper construction of the statute. The "assignee" means the assignee in any degree and however remote. By section 4884 the grant is directed to be made to "the patentee, his heirs or assigns." This is not limited to the first assignee. So section 4898, in declaring that "every patent, or any interest therein, shall be assignable," and that "the patentee or his assigns" may convey an exclusive right under the patent for the whole or any specified part of the United States, clearly means that an assignee in any degree is an assignee for all purposes. All parts of the statute are to be construed harmoniously in this respect, as there appears to be no good reason for a contrary construction. It is true that section 4 of the patent act of February 21, 1793, (1 St. at Large, 322,) used the words "assignees of assigns to any degree;" but the absence of the words "to any degree" cannot, in view of all the provisions of the present statute, be regarded as restricting the meaning of the word "assignee."

2. It is also provided by section 4895 that, "in all cases of an application for a reissue of any patent, the application must be made and the corrected specification signed by the inventor or discoverer, if he is living, unless the patent was issued and the assignment made before the eighth day of July, 1870." The applications for reissue, which resulted in reissues Nos. 7,927 and 8,490, were made, and the corrected specifications were signed, by Selden, and not by Tyler, Chandler, and Standish, and it was not shown that they were not living. It is contended that for this reason those reissues are void. It is claimed that this case is not within the exception in the statute, because, although No. 50,860 was granted before July 8, 1870, the assignment to Selden was not made until September, 1877. But it

is sufficient to bring a case within the exception if the assignment which divested the inventor of his interest in the patent was made before July 8, 1870. In the present case the inventors and patentees assigned the original patent in July, 1866.

3. It is contended that No. 8,490 is void because it is a reissue of a reissue, and that the statute does not authorize the reissue of a reissued patent. But section 4916 authorizes the reissue of "any patent." A reissued patent is none the less a patent, within this section, because it is a reissued patent. The section calls it after its issue a "patent so reissued."

4. It is urged that a reference to the original patent, and to the record of the reissues, discloses that the original patent was not inoperative or invalid by reason of a defective or insufficient specification. But this question was conclusively decided by the commissioner of patents, by the fact of his granting the reissues, the application in each case having set forth that the surrendered patent was inoperative by reason of an insufficient specification. *Seymour v. Osborne*, 11 Wall. 516, 543-545.

5. It is objected that in his application for No. 8,490 Selden made oath that No. 7,927 was inoperative by reason of an insufficient specification, and that his attorney afterwards, in a letter to the commissioner of patents, stated that the ground of the application was that the claims of No. 7,927 were too broad, in view of a prior English patent. The decision of the commissioner that a case provided for by section 4916 existed is not reviewable.

6. The same view applies to the objection that Selden's oath did not point out the particular insufficiency in the specification, or how No. 7,927 was inoperative.

7. It is objected that No. 7,927 and No. 7,928 were each of them issued for all parts of the thing patented. The point taken is that the original specification describes two forms of case—the circular case and the extended tube case; that these two forms of case are not "distinct and separate parts of the thing patented;" that each form of case has all the parts of the thing patented; and that each of said reissues is void for want of jurisdiction in the commissioner to issue it as a patent for a distinct and separate part of the thing patented. The commissioner has, by section 4916, power in his discretion, on the surrender of a patent, to "cause several patents to be issued for distinct and separate parts of the thing patented," on payment of the reissue fee for each. The original specification describes

the circular case, and also the extended tube case, the latter to be used for lighting at a height. Each form of case was to have in it the same apparatus. In the reissues, Nos. 7,927 and 8,490 show only a case of circular form for a pocket lighting device; and No. 7,928 shows only an extended tube case, for a gas-lighting torch. In each reissue the apparatus in the case is substantially the same, but each form of apparatus is fairly a distinct and separate part of the thing patented. The pocket lighting device cannot be used to light gas at a height, nor can the extended tube device be carried in the pocket.

8. There is no warrant for the suggestion that what is described and shown in the original specification and drawings is necessarily to be regarded as so dedicated to the public that if not claimed in the original it cannot be claimed in a reissue.

9. It is contended that No. 8,490 is void because it is not for the same invention as the original. One objection urged is that No. 8,490 speaks of the device as one for carrying in the pocket, and as a pocket lighting device, while the original did not speak of the pocket. But the original spoke of the circular case as one for convenient use, and as best suited for general use, and the structure, as shown in the drawings, and, doubtless, in the model, is, manifestly, one convenient for the pocket. What is said on this subject in No. 8,490 cannot be regarded as new matter. There is no difference in structure, or substantial alteration in drawings, or change of capacity. Various verbal criticisms are made in argument as to differences between the text of the original specification and that of No. 8,490, and as to differences in the drawings; but no witness for the defendant points out any of them as of any materiality, nor does a careful examination of those suggested show that they are of the least importance.

10. The defendant sets up against the novelty of the first five claims of No. 8,490, patent No. 48,459, granted to Henry B. Stockwell, June 27, 1865, for an "improved fulminate gas-lighter." That patent has been put in evidence by the defendant, but no expert witness for the defendant speaks of it, while the testimony for the plaintiffs shows that it does not anticipate those claims of No. 8,490. In each one of those claims there is a strip or coil of repeating match supported by a nose-piece, which is attached to the case and projects beyond it, and holds the match up against the action of the igniting device. There is no such arrangement, nor any equivalent for it, in parts or operation, in No. 48,459.

The defendant also sets up against those claims English patent No. 444, to Gabriel Benda, dated October 19, 1852,—provisional specification filed that day; sealed April 16, 1853; full specification filed April 19, 1853,—for “improvements in apparatus for obtaining fire for smokers.” The record shows that the attention of the patent-office was directed to the Benda patent in granting No. 8,490, and that the claims were amended in view of that patent. No expert witness for the defendant asserts that Benda is an anticipation. The Benda patent shows a case with a coil or strip of ignitable compound within it, so arranged as to be fed from the case by a feed-wheel, and when fed beyond the case it is ignited by bending it over and scraping it with the loose cover which serves, when the apparatus is not in use, to close the opening through which the strip is fed. There is not in it any nose-piece projected beyond the passage for the match, and serving to uphold the match against the action of the igniting device. There is not any igniting device arranged parallel, or nearly so, with the passage through which the match goes to be ignited. There is no permanently attached igniter, acting in conjunction with such a nose-piece. Benda had a repeating match, and a toothed-wheel match-feeder, feeding the match through a nose-piece to the point of ignition, and something on which the match rested while being ignited by friction produced by hand through an igniting device; but the mechanisms of the two structures are different, and their parts do not co-operate in the same way to attain the result of an ignited match.

11. It is claimed that the defendant's apparatus infringes the first five claims of No. 8,490. The plaintiff's structure operates by the friction of the igniter made to move crosswise by the hand against the match. In the defendant's the feeding of the match raises a spring-hammer, which, when the pellet on the match is at the proper point, is released, and ignites the pellet by percussion. But the defendant's structure contains, nevertheless, all the elements which constitute the first five claims of No. 8,490. The differences between the two structures are formal and unsubstantial, in view of the state of the art and of the real invention of the patentees and of the claims of No. 8,490. No expert witness for the defendant testifies as to non-infringement. There may be features of improvement in the defendant's structure, but still it is an infringement. The same structure is alleged to infringe claims 1 and 2 of letters patent No. 206,835, granted August 6, 1878, to said Selden, for an “improvement in cigar lighters.” The device described in that patent has a case

within which is coiled a strip of material having upon it ignitable pellets. This strip is fed out of the case by a feeding device, and, when one of the pellets has arrived at the proper position, it is struck by a hammer, and thereby lights a wick or flexible punk, which is contained in a tube which has a feeding device to govern the motion and position of the wick, and is provided with an extinguisher. The wick tube is so arranged in relation to the point of explosion of the successive pellets as to insure the lighting of the wick by such explosion when the extinguisher is removed from its closed position and the wick is fed forward by the feeding device. Claims 1 and 2 of No. 206,835 are as follows:

"(1) In a pocket lighting device the combination of an adjustable percussion tape, ignited by any suitable mechanism; (2) in a pocket lighting device a box or case having a hammer capable of operation from the exterior, a wick duct or tube, means for feeding and exploding a pellet by the action of the hammer, and a wick feeder."

The "adjustable tinder" is described as a wick or flexible punk, placed in a tube and adapted to be fed forward or upward by a star wheel or other suitable device for that purpose. The "adjustable percussion tape" is described as fed forward by a pawl. A mechanism such as "a star wheel or other suitable device" to feed the wick is an essential element in claim 1. It is a necessary feature of the "adjustable tinder" of that claim. It is also a necessary element of claim 2 as "a wick feeder." In the defendant's structure there is no such mechanism. The wick is pulled by the hand in both directions without any feeding mechanism. Therefore, there is no infringement.

There must be a decree for the plaintiffs, on the first five claims of No. 8,490, for an injunction and an account, with costs.

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**BERNARD and another v. HEIMANN and others.**

*(Circuit Court, S. D. New York. October 7, 1881.)*

**1. LETTERS PATENT—HEAD-COVERINGS—NOVELTY.**

Letters patent granted to Robert Gray, September 9, 1879, for an improvement in head-coverings,—the claim being for a head-covering consisting of a support of buckram or the like, a top layer of flock, and a cotton-flannel or other similar lining, substantially as and for the purpose described,—are not anticipated by the Kendall turban, Bracher's frame, the Morse hat, or the hats of 1876 of the Novelty Company.

*S. J. Gordon*, for plaintiffs.

*J. H. Goodman*, for defendants.

BLATCHFORD, C. J. This suit is brought on letters patent granted to Robert Gray, September 9, 1879, for an "improvement in head-coverings." The specification, which is accompanied by and refers to a drawing, which represents a sectional side view of a hat embodying the invention, says:

"This invention relates to the manufacture of hats, bonnets, or other head-coverings with a top layer of flock. Hats of this description have been made by applying the flock to a buckram support, but have invariably been stiff owing to the fact that in order to give the article the required body or strength it was necessary to use a heavy or thick piece of buckram. One objection to this hat is the stiffness referred to, it being desirable in some cases to furnish a soft hat, and another the visibility of the buckram tending to defeat the object of the flock-layer, which is to produce a felt-like article. My invention is a head-covering, consisting of a support of buckram or the like, a top layer of flock, and a canton-flannel or other similar lining, whereby the article is rendered capable of taking a soft finish, while both surfaces thereof have the appearance or semblance of felt—one of plain felt and the other of napped felt. In the drawing the letter A designates the support, B the flock-layer, and C the canton-flannel or other similar lining. In carrying out my invention I first cement the lining, C, to a piece of buckram, or other like fabric, by a suitable adhesive substance, with the nap of the lining exposed, and then press the two together in any usual or suitable manner to the desired shape. In lieu of canton flannel the fabric known as 'glove lining' may be used. I now apply to the buckram a layer of cotton, woolen, or other flock, this process consisting in coating the buckram with an adhesive substance, and strewing the flock thereon in finely-powdered form. The article is then in a state for trimming. The buckram, A, supports both the flock-layer, B, and the lining, C, and being re-enforced by the lining, a light or thin piece of such material may be used, rendering the article pliable or soft, substantially like soft felt. The appearance of the article, moreover, is felt-like, inasmuch as the lining has the semblance of napped felt and the flock-layer that of plain felt."

The claim is as follows:

"A head-covering consisting of a support of buckram or the like, a top layer of flock, and a canton-flannel or other similar lining, substantially as and for the purpose described."

The only defence is want of novelty. It is plain that the hat of the patent must be a hat made by pressing the materials into the shape of a hat, and not made, the top in one piece, the side crown in another, and the brim in another, and then these joined. There must also be—

(1) A layer of flock on a support of buckram, or the like; (2) a support of buckram, or the like, next the flock, with a coating of adhesive substance on the buckram, on which the flock is strewn; (3) a canton-flannel or other

similar lining on the face of the buckram, to which the flock is not applied, with the napped face of the canton flannel exposed, and not next to the buckram.

The Kendall turban, defendants' Exhibit No. 3, has no side crown or brim. Irrespective of this, it is not satisfactorily established that that article had in it any stockinet support, or anything but canton flannel, with flock applied directly to the unnapped face of the canton flannel. Bracher's frame, No. 6, if made with the unnapped face of the canton flannel exposed, had only flock enough put on the buckram to take an impression of the straw braid, and was made, not for use in that condition as a hat, but solely to be stamped as an imitation of a straw hat. The flock was put on only as a pulp on which to emboss, and the flock, by the embossing, lost its identity and parted with all resemblance to felt. The Morse hat, No. 13, is a flocked buckram hat, with a strip of canton flannel put in separately as a brim. Hats such as the Novelty Company hats of 1876, made of canton flannel, muslin, and flock, with the napped face of the canton flannel not exposed, were not the Gray hat. It is plain that cementing the nap to the buckram tended to destroy the pliability or softness aimed at by Gray, by reason of the absorption of the nap by the cement, and that there could be no appearance of napped felt.

The case is one where there was sufficient invention to support the patent, and there must be a decree for the plaintiffs, with costs.

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DOWNTON v. THE YAEGER MILLING CO.

(Circuit Court, E. D. Missouri. March 28, 1879.)

1. LETTERS PATENT—MIDDLINGS FLOUR.

Certain instruments, set out in full in the opinion delivered by the court, held not to amount to such an assignment by Downton, a patentee for a process patent, of which the claim is for manufacturing middlings flour by passing the middlings through or between rolls, of his right as patentee, as to preclude him from suing third parties who infringe his patent.

In Equity.

W. G. Rainey, for complainant.

G. M. Stewart, for respondent.

DILLON, C. J., (orally.) We are prepared to announce our conclusions in the case of *Downton v. The Yaeger Milling Co.* This is a bill in equity by the complainant, as the patentee in a certain patent granted by the United States for an invention,—in character a process patent,—against the Yaeger Milling Company for infringing the



monopoly or rights granted by that patent. The issues have been made up, and proofs have been taken. We ordered an argument on the question of assignment and estoppel, since that question, if decided in one way, would end the case against the complainant and obviate the necessity of the court going into the proofs on the merits.

Some time about the year 1872—that, perhaps, is common knowledge in this country now—there was brought into successful operation and practice the manufacture of flour of a superior quality or grade; from what is known to millers as the “middlings.” Before that time, in America, at all events,—although it was shown by the proofs in another case that they had much more intelligent conceptions on this subject abroad, and especially in France,—in America, however, prior to that time, what is known as the middlings, which constitute the most nutritious portion of the grain, by reason of a greater relative portion of gluten,—a nitrogenous substance which is more nutritious than the other parts of the wheat,—by what is known as the “new process,” were shown to be susceptible of making flour, as I said before, of a superior quality, and had the effect of revolutionizing the process of manufacturing flour very largely, and, at all events, to bring the spring wheat of the country, for economical purposes, in more favorable competition, if not on a par, with the winter wheats of the country. Now, when that improvement was practiced or brought into successful operation a year or two afterwards, the United States granted to Mr. Downton, the complainant in this case, what is known as a process patent, as distinguished from a patent for a mechanical device, which sufficiently appears from the claim which he made. After describing the state of the art, as required, he proceeds to state in the claim what he insists is covered by his invention, and for what he wants a monopoly or patent. Now, that claim is this: “The hereinafter-described process of manufacturing middlings flour by passing the middlings through or between rolls.” The middlings are a comparatively coarse product, and instead of regrinding them at once, as had been theretofore practiced, Mr. Downton claims a patent, and procured one, for passing them between rolls, (instead of comminuting or triturating them and reducing them to an impalpable powder,) which has the effect of flattening certain impurities, and they are enabled by a sifting process to eliminate said impurities before the middlings are reground; that is the process, viz., by the use of rolls as an intermediate step or process in the art of manufacturing flour. So he says:

"I claim, as new, the herein-described process of manufacturing middlings flour by passing the middlings, after their discharge from a purifier, through or between rolls, and subsequently bolting and grinding the same for the purposes set forth."

The point is that this is a process patent, as distinguished from a patent for a mechanical device. This difference in the law concerning patents for inventions is one of great moment. If it is a patent for a process, the particular mechanical device by which the process is worked is not patented; any machinery or mechanical device for executing the patent is not embraced in it. Generally a patent for a process, for that reason, is very much more valuable than a patent for a mechanical device, because whatever way you make any alteration in the device changes the nature of it, if it be for a combination patent; if you add an element, or omit an element, such patent is easily evaded. But not so with the process patent, which has no concern with the *specific* mechanical devices or contrivances by which the process is worked.

Now, Mr. Downton, after securing that patent, and, as shown by the proofs, being an intelligent man, and with an ingenious mind, also contemplated the procuring at this time of a patent for machinery for the purpose of working his process; for instance, this patent is to be worked, as it appears, by rolls and rollers, and he contemplated at this time the procuring of a patent for rolls—for a mechanical device, or machinery to operate his patent, and also for what is known as a middlings duster, known as "Downton's Peerless Middlings Duster."

Now, after he had obtained this process patent, and when he had these patents for machines in contemplation, he fell in with the firm of Allis & Co., of Milwaukee and Chicago, who it seems had a large establishment for the manufacture of machines of various kinds. Downton having the patents,—that is, having one and contemplating getting others,—it was supposed they could make an arrangement to act together, (Allis & Co. to manufacture the rolls and duster, and avail themselves of Downton's patent for the right or process,) and they made a series of contracts. I will allude to each of them very briefly. The only one now material to be considered is the one I first read:

"For and in consideration of the sum of \$125, to me in hand paid, I hereby sell, assign, and set over to Edward P. Allis & Co., of Milwaukee, Wisconsin, their successors and assigns, the exclusive right to manufacture and sell rolls for crushing grain or middlings, or other substances, No. 162,157, dated April

20, 1875, [which is the only process patent that was granted, and which was the only patent that had been granted to Downton at that time,] for the full life of such patent, and any reissues, extensions, or improvements thereon, except that the shop-right to manufacture and sell in the state of Minnesota, but not elsewhere, is granted to O. A. Pray, of Minneapolis; said Allis & Co. also having an equal right to sell in said state. Dated at Milwaukee, Wisconsin, this twenty-fourth day of January, A. D. 1876.

[Signed]

"ROBERT L. DOWNTON."

The next contract of the same date and a part of the same transactions, is an agreement:

"For and in consideration of the sum of \$125, to me in hand paid, and the further payment of the patent fees thereon, I do hereby sell, assign, and set over to Edward P. Allis & Co., of Milwaukee, Wisconsin, their successors and assigns, the exclusive right to manufacture and sell a certain machine for which I agree to obtain a patent, to be known as 'Downton's Peerless Middlings Duster,' for the full term of the patent, or any improvement or extensions thereon; and, upon the obtaining of said patent, I hereby agree to execute such assignment.

[Signed]

"ROBERT L. DOWNTON."

The third agreement on the same day is as follows:

"Witnesseth, that whereas, by certain agreements, bearing even date herewith, the rights to the exclusive manufacture of 'Downton's Peerless Middlings Duster,' and rolls for crushing grain, etc., patented by said Robert L. Downton, have been conveyed by him to said Allis & Co., \* \* \* it is hereby agreed that the engagement of said Robert L. Downton of his exclusive services to said Allis & Co., at the above rate of \$1,500 per annum, may be ended upon notice of six months by either party, or without notice, by payment of the sum of \$750 in money; and it is understood that said Downton is not entitled to take away any patterns, or otherwise, of any of the machines made by said Allis & Co."

[Signed by the parties.]

With this addenda:

"In case of the termination of the above engagement by death, or other casualty, the right to sell the machines referred to in the above agreement shall revert to the heirs or successors of R. L. Downton, the manufacture continuing in said Allis & Co., to whom all orders are to be sent."

[Signed by the parties.]

That was in January, 1876. Downton, the patentee under this patent, went into the employ of Allis & Co. under this agreement, and while in Allis & Co.'s employment he made a contract as the representative of Allis & Co., and of himself, in reality, as connected with Allis & Co., by virtue of this contract, with the Yaeger Milling Company to put certain rolls, which had been manufactured, or were to be manufactured, by Allis & Co., into their mill, which they were erecting at that time in this city. And two sets of rolls, manufactured by

Allis & Co. pending the continuing of the arrangement between them and Downton, were put into the mill under that contract which had been made by Downton, representing Allis & Co. as well as himself. After these had been put in, Allis & Co. failed, and proceedings in bankruptcy were commenced against them. That, Downton seemed to have conceived, had the effect to end these three contracts between himself and Allis & Co., and, at all events, from that time all business relations or connections between them ceased, as it is claimed. Allis & Co. were not adjudged bankrupts. They made an agreement or composition with their creditors, and proceeded in business. So that any rights they had under that contract they still have. Thus, the bankruptcy, by reason of its termination in this manner, ceases to be material in ascertaining the relations of the parties. As to the special point now under consideration, we assume that the proofs show that Yaeger & Co. had notice of the bankruptcy, and that Downton claimed that he had terminated this arrangement, and that Downton insisted that the whole contract between himself and Allis & Co. was at an end, and that all rights thereunder had reverted to him. After this, and after the alleged notice of the character I have described, Allis & Co., claiming that the contract was still in force and that they were the assignees of all rights of Downton, continued to manufacture these rolls, and the Yaeger Milling Company put in several other sets of rolls in their mill.

Now, this is a bill by Downton, as the holder of the process patent, to which I have adverted, against the Yaeger Milling Company for infringement of his rights under that patent in the use of these rolls, under the circumstances I have stated. This is an outline of the case.

Now, one question, on which we ordered an argument, is whether, under these circumstances, whatever may be Downton's rights as between himself and the rest of mankind, or as between himself and Allis & Co., who are not parties on the record in this suit, as Mr. Downton has never had judicial settlement or adjustment of his rights in a direct proceeding with Allis & Co.—whatever might be the rights of Mr. Downton as against anybody else—the question is whether he was not equitably estopped, as against Yaeger & Co., from insisting that they infringed his patent, by reason of the circumstances I have stated. The counsel have been heard on that, and we agree (Judge Treat and myself) that so far as the two rolls are concerned that were put in by Downton himself during the pendency of his relations with Allis & Co., and for which they paid Allis & Co.,

he is estopped to claim that the use of those rolls is an infringement of his patent. That, I think, is plain enough; for not only did Yaeger & Co. buy these rolls for the express purpose of using them of Downton as well as Allis & Co., but Downton took his proportion of the amount paid therefor. Therefore, as respects those rolls, it is too plain for controversy that Downton is estopped.

Now, as to the others purchased by Yeager & Co., after it is claimed they had notice that a controversy had sprung up between Allis & Co. and Downton, and were put in without Downton's consent, and after notice that, "If you do that, I (Downton) will hold you responsible." If these are the facts, then they went on at their peril.

Now, if the proofs shall show that they made a valid contract for, or bought and paid for, these rolls before they received notice of Downton's rights, then these additional rolls will stand on the same footing as the others; but otherwise, not. Another material point argued, and to be decided, is this: that Downton had disabled himself from maintaining a suit against anybody by reason of the assignment I first read. It being claimed that that was an *assignment* (as distinguished from a license) of his *entire rights* under the patent to Allis & Co., and therefore that he had made an entire unconditional assignment of his rights, and could not bring an action against anybody for invading those rights, which he could have brought had he not made the assignment. So the question is whether this is an assignment of his rights under that process patent:

"In consideration of the sum of \$125, to me in hand paid, I hereby sell, assign, and set over to Edward P. Allis & Co., of Milwaukee, Wis., the exclusive right to manufacture and sell rolls for crushing grain or middlings or other substances."

Now, he had no patent for rolls. He had no more right to make rolls than anybody else in the world. He had a patent for a process.

This is not a suit between Downton and Allis & Co., but a third party, against whom Mr. Downton, as patentee, has brought a suit. He produces his patent, and claims that they have infringed it. They come in and say, "You cannot maintain this suit, because you have assigned *all* your rights, under this process patent, to another party, and, if we are liable to any one, we are liable to them, *i. e.*, Allis & Co., and not you." The defendants are setting up this contract as an assignment, and, in my view, in order to enable them to avail themselves of it as such, it must appear on its face to be a complete assignment of Downton's rights; if not, he can maintain this suit if

not otherwise equitably estopped. Now, did he by this *instrument assign* his rights under the process patent? He says, "I grant to them the exclusive right to manufacture and sell rolls for crushing grain or middlings, or other substances, \* \* \* which right or process to manufacture and sell rolls is secured to me by said patent." This seems to be based on a mistake from the beginning to the end. It is said, however, by the defendants that he meant to convey something, and you must put a construction on it so as not to defeat the operation of the instrument. But my judgment is, since this does not operate intrinsically or *ex proprio vigore* as an assignment by Downton of his rights under that patent, they remain in him, and will remain in him as against Allis & Co., until Allis & Co. shall secure, by the decree of a court in equity, if thereto entitled, a specific execution of an assignment of the process to them.

In conclusion let me add that I only decide:

1. That the instruments executed by Downton to Allis & Co. do not, nor does either of them, amount to such an assignment of the rights of Downton, as patentee, as to disable him from suing persons generally who infringe his patent if the same is a valid patent.
2. But whether he can maintain a suit against the purchasers of rolls from Allis & Co., who use the same in such a manner as to infringe his patent, will depend upon the principles of the law of estoppel. Applying these principles, it sufficiently appears that he is estopped as to the first set of rolls; but whether he is estopped as to the others will depend upon the special facts and circumstances which will be considered when the cause comes on for final hearing.

Judge Treat does not agree in the above view as to the effect of the assignment and as to estoppel, but that being my view the case will be disposed of on this point in accordance with the views I have expressed, if it shall turn on them. We have not considered the merits. They will stand for a further argument and hearing.

TREAT, D. J. Putting a proper construction on these agreements, and taking into consideration the fact that Downton, over his own name, published to the world that whoever bought rolls of Allis & Co. should have the right to use the process, I think there is an estoppel in this case, as Yaeger did buy his rolls of Allis & Co., some of which rolls were put into the mill under Downton's own superintendence.

So far as the contracts and agreements are concerned, standing as they do now, and holding that this contract is designed to convey something, the plaintiff cannot recover, as the right to use is given

to any person purchasing rolls of Allis & Co., and these defendants did purchase rolls of Allis & Co. The controversy, primarily, should be between Allis & Co. and Downton, setting up all these matters, as between them, to take out of them or him any pretended right either may have.

But, so far as third persons are concerned, who acted on the faith of Downton's conduct, publications, and the recorded assignment, they cannot be proceeded against for the use of this process. To get rid of any difficulty in this matter, he should proceed directly against Allis & Co. to have the original agreement reformed, so as to correct the mistakes which may be, possibly, detected by looking at the contemporaneous agreements between the parties. In other words, there should have been a suit against Allis & Co. to reform the agreements, as between themselves, and having them reformed, sue any one who thereafter might infringe the process.

On the trial, at the proper time, the merits will be considered to determine as to the validity of the process patent.

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### PROVOST v. PIDGEON.

(District Court, S. D. New York. September 23, 1881.)

#### 1. ATTACHMENTS—WHEN SET ASIDE.

An attachment will be set aside in the absence of any proper endeavor to make personal service upon the respondent.

#### 2. MARRIED WOMEN—PROCESS.

When the respondent is a married woman, having no place of business or of customary resort other than her home, which there is no reason to suppose she has left, an omission to seek her there, or at her usual or last known place of residence, must be held a failure of any proper endeavor to make personal service.

#### 3. MISUSE OF PROCESS—PRACTICE.

When it is clear from undisputed facts that through the want of any proper effort to make personal service the process has been used in an unauthorized manner, such misuse will be corrected on motion.

In Admiralty. Motion to set aside the service of process of attachment.

*Samuel B. Caldwell*, for libellant.

*P. Cantine*, for respondent.

BROWN, D. J. A libel *in personam* was filed in this case on September 5, 1881, to recover for supplies furnished the steam-tug Frank Pidgeon, Jr., in her home port, during 1877 and 1878. On the same day process was issued to the marshal, with the usual clause

directing him, in case the respondent could not be found, to attach her goods, etc., to-wit, the steam-tug Frank Pidgeon, Jr. The return of the marshal states that "after diligent search and inquiry he was unable to find the respondent, and that he thereupon, on September 5th, attached the respondent's right, title, and interest in the steam-tug by leaving a copy of the process with the engineer in charge of the tug, and showing him the original." Upon the return-day the respondent appeared specially for the purpose of moving to set aside the service of process on the ground that no proper attempt was made to find or serve the respondent personally before attaching the tug.

The matter has been submitted to my determination upon the affidavits of the parties, and of the deputy marshal who made the service. From these it appears—

That the respondent is the wife of Francis Pidgeon, of Saugerties, Ulster county, New York, where she has for many years resided; that she has been owner of the tug since August, 1876, and that the bill of sale of the tug to her, registered at the New York custom-house, describes her as residing at Saugerties; that her husband, who has had the management and control of the tug, has for 20 years past had a place of business at Long Island city, and has been known to the libellant, who also did business in the same neighborhood for about that time; that the libellant knew he resided "up the river this side of Albany, but did not know his precise residence;" and that, prior to filing the libel, he had reason to believe that the respondent was the wife of said Frank Pidgeon, and the libel itself so states; that the supplies furnished by the libellant, for which this suit was brought, were furnished at the husband's request; that prior to the attachment the husband had, for some time, been absent from his place of business at Long Island city, and was supposed to have become insolvent; that the libellant's proctor, before filing the libel, had consulted the registry at the custom-house, and found that the respondent was owner of the tug since August, 1876; and that the marshal, on receiving the process for service, was informed by the libellant's proctor that the respondent was believed to be the wife of Francis Pidgeon, and that she resided in Saugerties in 1876, but whether she now resided there or not he did not know; that her husband had a place of business at Long Island city; that the marshal went to the husband's said place of business, did not find him, nor "learn anything of his whereabouts," either there or upon inquiry in the neighborhood; that he thereupon went to the tug, and, without inquiry for the respondent, attached it at once, and was thereupon immediately informed by the captain that Mr. Pidgeon was at Saugerties.

From these facts it seems evident to me that no *bona fide* endeavor was made by the marshal to serve the respondent personally. It was sufficiently known to him that she was the wife of Francis Pidgeon, and that she resided in Saugerties in August, 1876. The registry so stated, and the libellant's proctor so informed him, and no reason is



suggested for supposing her place of residence to have been changed. She had no place of business at Long Island city or elsewhere, and the only place where she was likely to be found, so as to be personally served, was at the home of herself and husband in Saugerties. That is within this district. It was the marshal's first duty to seek her there. He was not bound to go elsewhere, except upon some further definite information of her whereabouts. Having no reason to suppose her absent from her home, he had no right to forbear going there to find her, simply because it was in a portion of his district remote from his office, and therefore inconvenient to him to make personal service. To admit such an excuse would be to deny the benefit of equal laws to all parts of the district, and to inflict a penalty upon those who happen to live at a distance from the marshal's office.

The marshal sought for the respondent's husband at Long Island city. Had he found him there it would not have aided him in making personal service upon the respondent. It was possible her residence might have been changed, and the marshal might properly enough have sought her husband to be assured of that fact; but, not having found him, his duty remained of seeking her at her last known place of residence, the only place she was at all likely to be found. Had the marshal found the husband it would only have resulted in informing him that the respondent could be served at Saugerties, and of this fact the marshal already had sufficient presumptive evidence. Had the real purpose been to find and serve the respondent, no reason appears why inquiry should not have been made of the master of the tug before serving the attachment, instead of immediately afterwards, when the respondent's residence at Saugerties was again indicated. The fact, moreover, that the libellant's proctor had, before filing the libel, sought for the respondent's husband at Long Island city, and been informed of his continued absence from his place of business there, leads to the inference that the marshal's renewed inquiry for the husband or for the respondent at Long Island city instead of at Saugerties, together with the absence of inquiry at the tug before attaching her, could scarcely have been for the purpose or with the expectation of finding or serving her, but rather as a *pro forma* preliminary to an intended attachment of the tug without any serious endeavor to serve the respondent.

The case seems to be entirely within the principle of the decision of Judge Choate in the case of the *International Ceiling Co. v. Dill*, (unreported; to appear in 10 Ben.) where it was held that, in the absence of any previous endeavor to make personal service upon the

respondent, the attachment must be set aside. The return in the present case, it is true, alleges "diligent search and inquiry," which was not alleged in the former case. But the facts in this case, as in that, are substantially undisputed upon the affidavits submitted. In the former case there was no attempt at all to serve the respondent. In the present case the only attempt was by inquiries for the respondent's husband at his place of business, a hundred miles from her home, and a place where there was no reason to suppose she could be found or had ever been; while she was *not* sought at her home in Saugerties, of which the marshal was sufficiently informed, which there was no reason to suppose she had left, and where she might easily have been served. This is not entitled to be considered any attempt at personal service. When the respondent is a married woman, having no place of business or of customary resort other than her home, which there is no reason to suppose she has left, an omission to seek her there, or at her usual or last-known place of residence, must be held a failure of any proper endeavor to make personal service. When the affidavits present any important disputed question of fact relative to the marshal's endeavor to make service, the persons aggrieved must be remitted to their remedy by action against him for a false return, (*The International, etc., v. Dill, supra; Harriman v. Rockaway, etc.,* 5 FED. REP. 461;) but where it is clear from the undisputed facts that the process, through the want of any proper effort to make personal service, has been in effect used in an unauthorized manner, such misuse should be corrected on motion without involving the parties and the officer in the expense or delay of an action for false return.

For these reasons the attachment should, in this case, be set aside. As the marshal's return does not import any seizure of the tug (*Brennan v. The A. P. Dorr*, 4 FED. REP. 459) no costs seem to have been incurred.

## THE PLYMOUTH ROCK.

*(District Court, S. D. New York. 1881.)*

## 1 SALVAGE—PASSENGER STEAMER.

Towage rendered to a vessel that is disabled, and in a situation to occasion reasonable apprehension of danger, is salvage service. Hence, where the Plymouth Rock, a passenger steamer of light draught and excessive "free board" exposure to the wind, in grade belonging to the class of river and sound steamers, and rated as A 2½, became completely helpless as to motive power by the breaking of her steam-pipe within a short distance of the New Jersey coast, in a north-east gale and a heavy sea, and with only two-thirds of the usual equipment in anchors and chains of full sea-going vessels, *held*, that the service performed in towing her into the port of New York is a salvage service.

## 2. SAME—COMPENSATION.

In the language of the court, the most important considerations in fixing such awards are the value of the property rescued, the number of lives imperilled, the degree and imminence of the danger, the proximity of other means of succor, the hazard, labor, and skill of the salvors, the duration and difficulty of the service rendered, the value of the vessel employed, and her danger in rendering it, and the incidental risks or responsibilities incurred by the latter or her owners, if any, through any deviation from her voyage in rendering the service.

In this case \$2,000 was adjudged to be a just award, in view of all the circumstances.

## In Admiralty.

*Butler, Stillman & Hubbard*, for libellants.

*Sidney Chubb and Wm. W. Goodrich*, for claimant.

BROWN, D. J. The libel in this case is filed by the owner, together with the master and crew, of the steam-tug *Germania*, consisting of seven persons, to recover the sum of \$10,000 for salvage services rendered to the Plymouth Rock, August 17, 1881. The answer admits that towage service was rendered, and tenders \$300, which it alleges is a reasonable compensation therefor, and denies that the libellants are entitled to any compensation as salvage.

The Plymouth Rock is a side-wheel passenger steamer, originally constructed for navigation upon Long Island sound. Her length is 325 feet, beam 28 feet, tonnage 1,812 tons,—half above and half below,—her main deck depth of hold 12 feet, and draught loaded about 9 feet; her boilers are set upon guards, on a line with the main deck; above this is the promenade deck, and a hurricane deck above. Some years ago she was withdrawn from the sound, and used as an excursion steamer. In grade she belongs to the fifth class of steamers,—*i. e.*, river and sound steamers,—and in that class ranks as A 2½, "very low as a sound steamer;" not being fitted, either in structure or equipment, for general ocean navigation, nor for the coasting service. She has been consid-

ered suitable, however, for short excursions on the ocean, except in rough and tempestuous weather. She had no sails. The area of her upper works presented to the wind, technically called her "free-board," was essentially large as a sea-going vessel for her draught and tonnage, and her anchors were one of 1,699 pounds, (without the stock,) and the other of 1,994 pounds, provided with 60 and 75 fathoms of chain. The rule for sea-going vessels, of the same tonnage, would require one anchor of 2,800 pounds, and one of 3,200 pounds.

During the summers of 1880 and 1881 she was employed in making daily trips from New York to Long Branch, going outside of Sandy Hook and thence along the New Jersey coast about 13 miles, and landing her passengers at the iron pier built out from the beach some 900 feet. She has carried as many as 3,000 passengers, and sometimes, from the roughness of the sea, she has been obliged to return without landing. On the seventeenth of August, 1881, she left her dock at Twenty-third street upon one of her usual trips at a little after 9 o'clock in the morning, with about 500 to 600 passengers on board, besides some 75 others,—musicians, servants, seamen, etc. On passing the Narrows the weather and sea were found to be rough, and the wind was blowing a moderate gale from the north-east and the tide flood. She proceeded, however, upon her course, and when about a mile beyond the end of the Hook, at about half past 11 A. M., the steam-pipe was suddenly broken, letting all the steam from her boilers escape, and she thereby became completely disabled and helpless in her motive power. The steam passed mostly out midships, through the opening for the piston and walking-beam; but a considerable amount penetrated the main deck and into the saloon above, creating for a time a panic among the passengers and musicians. I do not find from the evidence that the officers or crew shared in the general confusion or alarm, or failed in their appropriate duties.

The evidence is very conflicting in regard to the distance of the Plymouth Rock from the beach at the time of the accident. I shall adopt the position assigned her upon the chart by Capt Ladd, the pilot in charge, which indicates about three-eighths of a mile, or about 2,000 feet from the shore. This position was near her usual track, in the deep water of the False Hook channel, where her progress would be easiest. In the rough weather of that day it is altogether improbable that she would go much further eastward, so as to be not only out of her usual course but in the shallow waters over the False Hook, where she would labor more and her progress be less easy. At 10 o'clock that morning the wind had been blowing a moderate gale of 32 miles per hour from the north-east directly on shore, according to the record kept at Sandy Hook; at 11:15 it blew 22 miles, and at 3 P. M. it was but 13 miles per hour. Just before the accident, one schooner was observed going to sea without reef in her sails, but in general most other vessels—pilot-boats and others—had hauled under the Hook for shelter. The steamer Plymouth Rock met some of them coming in,—the tug J. B. Schuyler, the Blackbird with a fishing party,—a pilot-boat, under double-reefed sails, going inside, under the lee of the Hook. The sea was recorded as "heavy," the testimony fully sustaining the record; and the tide was a strong flood, setting partly

on shore. In a few moments after the accident, as soon as her headway was lost, the Plymouth Rock settled into the trough of the sea, broadside to the wind, and in that position, with the great area of her upper works, and the consequent great expanse to the force of the wind, it is manifest, under the combined effect of a strong wind and tide and a heavy sea, she must have speedily gone ashore; and this, as soon as the escaping steam had disappeared, was the fear of her passengers. Her sole dependence was upon her anchors.

At the time of the accident the Germania, a staunch and powerful sea-going steam-tug, 100 feet in length, with engines of 125 horse-power, was cruising at sea in search of vessels needing assistance, and was then from one to two miles to the south-east of the Plymouth Rock. Those on board of her saw the escaping steam and also observed what appeared to be blasts of her whistles, then too far to windward to hear them. These were interpreted as signals of distress, and the libel charges that such signals were given. The answer, however, denies this, and the proof established that no such blasts of the whistle, nor any other signals of distress as of desired aid, were given from the Plymouth Rock. Her engineer, driven from the engine-room, had ordered an assistant to go upon the hurricane deck and open the two safety-valves to facilitate the escape of steam. This was done, and the dense jets of steam from the safety-valves, lasting for a few moments, are what those on board of the Germania misunderstood as signals for help. The Blackbird, which at the time was just going in round Sandy Hook and saw the escaping steam, did not surmise that the Plymouth Rock was in trouble and proceeded on her way. The Germania, immediately upon these supposed signals, went to the assistance of the Plymouth Rock, and reached her in about 10 minutes after the accident. The captain of the latter, seeing the Germania approaching, countermanded the orders which the pilot had previously given, to cast the port or smaller anchor, which had already been unlashed by the first officer, and was previously shackled to the chain, with some 15 fathoms overhauled.

The Germania was up athwart the bows of the Plymouth Rock. The pilot of the latter asked to be towed in, and inquired the price. The captain of the Germania answered that it was no time to make any bargain; that they would take hold and leave it to be settled how much it was worth. From each vessel a line was then hove to the other, having a hawser attached; that from the Germania missed. The line from the Plymouth Rock, with her hawser of 50 fathoms' length attached, was drawn upon the Germania, and the hawser made fast, and the head of the Plymouth Rock was then pulled round to windward. This occupied from 10 to 15 minutes from the time the Germania came along-side. An additional hawser of the Germania was shortly after attached, and the Plymouth Rock was then towed to her dock at Twenty-third street, New York, without further difficulty then, at about 4 o'clock P. M. After passing the Hook, the City of Richmond got a hawser ahead the Plymouth Rock with considerable trouble and delay, owing to the roughness of the sea, and assisted in the subsequent towage. This assistance was not entitled to and does not diminish the claims of the Germania for her services. No damage after the accident was done to either vessel, and no person on board of either vessel sustained any loss or injury.

Upon these facts I am of opinion that the *Germania* is clearly entitled to charge compensation, according to both early and late decisions. *The Raikes*, 1 Hagg. 246; *The Charlotte*, 3 W. Rob. 68, 71; *The Saragossa*, 1 Ben. 551; *The Leipsic*, 5 FED. REP. 108, 113; *Brooks v. The Adirondack*, 2 FED. REP. 387, 872; *Atlas Steam-ship Co. v. The Colon*, 4 FED. REP. 469; *McConnochie v. Kerr*, 9 FED. REP. 50. If not salvage it is "mere towage." In the definition of towage given by Dr. Lushington in the case of *The Princess Alice*, 3 W. Rob. 138, so often cited, he says: "Without attempting any definition which may be universally applied, a towage service may be described as the employment of one vessel to expedite the voyage of another when nothing more is required than the accelerating her progress;" and in the case of *The Reward*, 1 W. Rob. 174, he says mere towage service is confined to vessels that have received no injury or damage; where the vessel receiving the service is in the same condition she would ordinarily be in without having incurred any damage or accident. These rules have been adopted and applied by this court in the case of *The Saragossa*, 1 Ben. 551, and in many other cases.

In the case of *Hennessy v. The Versailles*, 1 Curtis, 356, the court, Curtis, J., says:

"I do not think there is such a thing as towage service known as such to the marine law, as contradistinguished from a salvage service. Towage, like pumping or steering, making sail, or any other ship work, may occur in the ordinary course of navigation, or may be a means of salvage; and whether it is to be paid for according to a *quantum meruit*, or at an agreed price, or by wages, or by a salvage compensation, must depend upon the circumstances under which it is performed. In this case the *Versailles* being in distress, and in a condition to have a salvage service rendered to her, and having been relieved by towage, that towage was in its nature and circumstances a salvage service."

Now, it is not necessary to constitute a salvage service that the danger be immediate or absolute; it is sufficient that at the time the assistance is rendered the ship has encountered any danger or misfortune which might possibly expose her to destruction if the service were not rendered. *The Charlotte*, 3 W. Rob. 68-71; *The Saragossa*, 1 Ben. 551. A situation of actual apprehension, though not of actual danger, is sufficient. *The Raikes*, 1 Hagg. 247; *The Sloop Joseph C. Griggs*, 1 Ben. 81; *The Bella Constance*, 33 Law J. (N. S.) 191. When towage, therefore, is rendered to a disabled vessel, not with a view merely to expedite her passage from one place of safety to another, but with the obvious purpose of relief from some circumstances

of danger, either present or reasonably to be apprehended, compensation upon salvage principles is to be allowed. Even cases of corporation salvors, cited by the claimant's counsel, at one time held not to be within this rule, (*The Stratton Audley*, 3 Ben. 241; *The J. F. Farlan*, Id. 207,) are no longer an exception. *The Camanche*, 8 Wall. 448; *The Birdie*, 7 Blatchf. 238. The degree of danger is of no importance as regards the application of the principle itself, (*The Westminster*, 1 W. Rob. 232,) although it is of the utmost importance in fixing the amount of compensation under it.

To say that the Plymouth Rock, upon becoming completely disabled by the loss of her steam-power within a quarter of a mile of the shore, as I hold she was when the *Germania* reached her, with her light draught and excessive "free-board" exposure to the wind, in a north-east gale and a heavy sea, on the New Jersey coast, and with only two-thirds of the ordinary equipment in anchors and chains of full sea-going vessels, was in a situation to afford a reasonable apprehension of danger, would, I think, be stating the case very mildly, and it is too obvious to require further comment. I find much more difficulty in determining the proper amount of salvage compensation to be awarded. The most important considerations in fixing such awards are the value of the property rescued, the number of lives imperilled, the degree and imminence of the danger, the proximity of other means of succor, the hazard, labor and skill of the salvors, the duration and difficulty of the service rendered, the value of the vessel employed, and her danger in rendering it, and the incidental risks or responsibilities incurred by the latter or her owners, if any, through any deviation from her own voyage in rendering the service, as usually happens in salvage cases at a distance from port.

The value of the Plymouth Rock is not shown by any competent proof to have been greater than the sum of \$60,000 admitted by the owner. The fact that she was put for the whole issue of the capital stock of \$100,000 in the formation of the Plymouth Rock Company, from which company the claimant bought her, though evidence of value, possibly, as against that company, cannot be binding upon the claimant here. The value of the *Germania* was about \$21,500. She was employed upon this service about five hours, which, considering her previous going out to sea, is equivalent to one day's service. She was doubtless subjected to some increase of peril, in case of accident or unskilful handling, in approaching the Plymouth Rock upon a lee

shore in a heavy wind and sea; but, aside from this, she incurred no additional burdens or responsibilities. She was prosecuting on her own part the business for which she was in part designed, and was in the ordinary pursuit of her employment, and she suffered no loss or injury in rendering the service; and neither the difficulty nor the personal labors or hazard of the salvors themselves greatly, if at all, exceeded those in cases of ordinary towage in rough weather; and other tugs were either near at hand or within a few hours' call. Many of the important circumstances, therefore, which often go to increase the amount of salvage compensation are either wholly wanting in this case or exist in only a comparatively small degree.

On the other hand, the large number of passengers whose lives were involved in the safety of the vessel is in this case an important consideration, although by the general maritime law, aside from statute, the saving of human life, disassociated from the saving of property, is not a subject of salvage compensation, but left to the bounty of individuals; yet when connected with the rescue of property it is uniformly held to enhance the meritorious character of the service and the consequent remuneration. *The Aid*, 1 Hagg. 84; *The Queen Mab*, 3 Hagg. 242; *The Emblem*, Davis, Rep. 61; *The Fusileer*, 3 Moore, P. C. 51; Marvin on Salvage, § 121. Life salvage is now expressly provided for by the British Merchants' Shipping Act of 1854, §§ 458, 459; but we have no similar statute in this country. The weight to be given, however, to this consideration, as in considering the risk to the vessel herself, depended largely upon the degree and imminence of the danger, the probability of disaster if unrelieved, and the opportunities for other means of rescue. That the situation of the Plymouth Rock, when disabled by this accident, was in general one in which danger was reasonably and justly to be apprehended, is sufficiently manifest. But in attempting to go beyond that and to determine the precise degree of her danger; whether she would have gone ashore if unrelieved; whether her anchors and chains were insufficient and would have dragged, or how much or how rapidly; or whether, in the wind and sea then raging, her structure was such as to ensure her riding at anchor safely without further accident or injury,—much is left to conjecture and uncertainty amid the contradictory opinions of the witnesses. It was not, however, denied that she was not built for a sea-going steamer, nor that her rank for a sound steamer was very low. If, therefore, the conditions of wind and sea were of any great degree of violence



the presumptions were all against her upon so dangerous a coast. Upon this point also the witnesses greatly differed. Several witnesses on the part of the libellants, accustomed to going outside in all weathers, testified that the sea was about as "nasty" as they were ever out in. A pilot, who had come past the Long Branch pier that morning, said the waves were dashing over the end of it, and that the Plymouth Rock could not have landed her passengers; while the captain and others on the Plymouth Rock testified that they had been down to the pier and landed passengers in rougher weather. Most vessels were, it is true, returning inside for shelter; but a schooner was seen going out without reef in either foresail or mainsail. In the record kept at Sandy Hook the sea was set down as "heavy;" the wind was north-east; 32 miles per hour at 10 A. M., 22 at 11.15, and 13 miles per hour at 3 P. M. While the sea, therefore, was bad, the wind was abating, and the conditions in these respects were far from being the worst which sea-going vessels are called upon to encounter.

Much testimony was given concerning the sufficiency of the chains and anchors. The weight of the two anchors were at length fixed at 1,699 and 1,994 pounds. The tonnage of the Plymouth Rock would require for sea-going vessels 2,800 and 3,200 pounds, according to the testimony of Mr. Hazard, an acknowledged and competent expert. He testified that each anchor should have 90 fathoms of chain. The Plymouth Rock had 60 and 75 fathoms. While her equipment in these respects was one-third less than required for sea-going vessels, her "free-board" exposure to the wind was greatly in excess of sea-going vessels of the same tonnage; and her draught or hold upon the water much less, which would expose her to special peril in a high wind and sea; and on these grounds many of the libellants' witnesses expressed the opinion that she would have drifted ashore with both anchors out, while the claimant's witnesses thought she would hold with one anchor alone, with 25 or 30 fathoms of chain. The bottom was sandy, affording, though not the best, yet fair anchorage. Neither the sufficiency of her anchors nor her behavior at anchor, under any conditions analogous to the present, appear ever to have been actually put to the test. Capt. Curtis had been in charge of her from time to time for nearly 20 years, and had she ever been in the like situation before and behaved creditably, it would doubtless have appeared on the trial. The instances cited of her anchoring off Cape May in a rough sea but nearly calm wind are not pertinent. From the absence of proof of the Plymouth Rock

or any similar boat being in any analogous situation in the open sea, it may, perhaps, be inferred that vessels of this class have been unusually carefully kept out of the reach of such casualties. The nearest analogy to the situation of the Plymouth Rock proved at the trial was the case of the Narragansett, a steamer of about the same tonnage and value and free-board exposure, but whose boilers were in her hold, which anchored in the sound in a snow storm near the shore opposite the Connecticut river, in a similar wind, but I judge a much less heavy sea, in 14 feet of water, with one anchor of 2,080 pounds and 45 fathoms of chain.

While the testimony on these points does not lead to any certain result, the explanation of the accident itself, as given by the engineer of the Plymouth Rock, illustrates conclusively her unfitness in structure for the situation she was in. In his opinion the accident was caused by the sea rolling under her as she listed to starboard, and lifting her guards and the boiler resting upon them, and thus causing the fracture of the rigid steam-pipe connecting the boiler with the engine. Still further lifting of her guard might cause her to fill and sink. This was the danger Mr. Haswell had already pointed out. The claimant's witnesses had put her guard amidships at nine feet above water; but, as her hold was but twelve feet deep, this would leave but three feet of her hold below water, while her draught was nine feet. On the argument it was conceded, therefore, that the height of the guard had been given incorrectly. It should probably be reduced one-half. Mr. Haswell considered that her "situation," assuming that the sea was sufficient for her to take water under her guard, was perilous, if obliged to remain there for some time, not for a few minutes or half an hour, and he considered her anchors and chains insufficient.

I am satisfied that the witnesses from the Germania have greatly exaggerated the nearness of the Plymouth Rock to the shore. Several of them stated that she was not more than twice her length from the breakers when they reached her, and within one length when they got her headed off. The shore is there rather bold, and the breakers, according to Capt. Curtis, are only some 50 feet from the beach. But if, as appears from their testimony, the Plymouth Rock drifted but once her length during the 10 or 15 minutes which the Germania occupied in getting hold and heading her off, she would have drifted no more during the same time previous, which, according to the testimony, it took for the Germania to reach her after the accident.

And as she was at that time, as I have found above, about 2,000 feet from the beach, she must have been more than a quarter of a mile from the beach when the *Germania* reached her.

It is equally clear, I think, that the master and officers of the *Plymouth Rock* had no apprehension of any immediate danger. There is no evidence of any want of coolness, or of any confusion or alarm on their part. No whistles were sounded, no signals for relief exhibited, as would have been done had any immediate disaster been feared. The port anchor was unlashd and ready, with 15 fathoms of chain overhauled, to be cast at once. The starboard anchor, with 25 fathoms of chain overhauled, could have been also cast in some 15 or 20 minutes, and from 60 to 75 fathoms of chain to each could have been let go if required. The pilot's order to throw the port anchor was countermanded by the captain because he saw the *Germania* approaching. This is no evidence of the officers' distrust of the anchor, or of their fear of the vessel's inability to ride at anchor for a considerable period without further accident,—long enough, at least, to procure help from other vessels, some of which were near at hand, while others, if needed, could have been procured from New York within a few hours. The sea was doubtless as heavy as it had been, but the force of the wind had already greatly abated, and continued to decrease rapidly, until at 3 P. M. it was but a moderate breeze. Considering this great decrease in the strength of the wind it is most probable that the *Plymouth Rock*, had no further accident occurred to her, might have maintained her anchorage without going ashore for a considerable time,—long enough to obtain any other help she might have desired.

In my judgment, therefore, the *Germania* cannot, upon the evidence, maintain her claim to the high merit of having saved the *Plymouth Rock* and her many valuable lives from disaster, which, if justified by the proofs, would have entitled her to large compensation. But the circumstances at the time of the accident were none the less such as to justify great apprehension. That the gale would continue to abate could not then be known; had it increased, the situation of the *Plymouth Rock* might have become critical. The business of the *Plymouth Rock* was with passengers exclusively. Her first duty, when disabled and in peril, was to provide for their deliverance as speedily as possible, not only from actual danger, but also from the terror and suffering of long exposure to the apprehension of shipwreck. To the enterprise of the *Germania*, cruising in tempestuous

weather to aid those who might be in distress, while other vessels were seeking shelter, it is due that almost instant relief was provided for the Plymouth Rock and her terror-stricken passengers.

It has often been held that the interest of commerce and humanity require that the maintenance of large and powerful steamers, to assist in saving property in peril at sea, ought to be encouraged by liberal compensation when their services are needed. In few cases are these services more needed or more timely than when excursion steamers, not adapted for services at sea, are sent loaded with passengers out upon the open ocean, and are there caught, through accident, in those very circumstances of peril which they have neither the build nor the equipment (with the ordinary guaranties of safety which sea-going vessels are required to possess) to meet. The service of the *Germania* is, therefore, a meritorious one, and deserves substantial reward, but not one out of proportion to the actual emergencies of the situation; and the fact that it was performed with celerity adds to, rather than diminishes, the merit of her claim. *The Constance*, 33 Law J. (N. S.) 191.

In cases like the present, however, where no signals for relief have been given, and where the urgency for immediate assistance is not shown to be certain, and evidently was not believed to be great by an experienced and competent master in command, no such large compensation ought to be made as shall operate to deter masters from promptly availing themselves of offered assistance, or lead them to prolong risks to life or property rather than incur large salvage awards. *Ehrman v. Swiftsure*, 4 FED. REP. 463.

In view of all the circumstances, I think \$2,000 will be a just award, —two-thirds to go to the owner of the *Germania*; of the remainder, \$100 to be paid to the captain, and the rest apportioned among the captain and crew according to their wages. Let a decree be entered accordingly, with costs to the libellants.

## YE SENG CO. v. CORBITT &amp; MACLEAY.

(District Court, D. Oregon. September 5, 1881.)

## 1. AGENT, WHEN LIABLE ON A CONTRACT.

A person who signs a contract as agent without disclosing the name of his principal is liable thereon as principal.

## 2. AGENCY.

A person authorized to act for the charterers of a vessel, as agent to procure a cargo in a foreign port, is not thereby authorized to modify or cancel the charter-party of his principal.

## 3. IMPOSSIBILITY—WHEN NO EXCUSE FOR NON-PERFORMANCE OF A CONTRACT.

The owners of a vessel chartered her to carry passengers from Hong Kong to Portland, and stipulated in the charter-party that she was "tight, staunch, and strong, and in every way provided for said voyage;" but upon her arrival at Hong Kong she was found by the surveyor of the port to be "not fit to carry passengers," and refused permission to do so by the local authorities. *Held*, that the owners were not thereby excused from their contract, which was absolute and without condition, to carry passengers out of Hong Kong; and that, even in the absence of the stipulation in the charter-party as to the character and condition of the vessel, the law would imply from the undertaking of the owner that she was in all respects "fit" to carry passengers out of said port.

## 4. DAMAGES.

The charterers procured 200 passengers to ship on said vessel out of Hong Kong at rates that would have netted them \$14 apiece, or \$2,800 in the aggregate, which gains they were prevented from making by the failure of the owners to perform their contract. *Held*, that the prevention of these gains was a damage to the charterers which naturally arose from the breach of the contract, and must also have been in the contemplation of the parties thereto, and therefore they are entitled to recover them in a suit for such breach.

## 5. MONEY PAID INTO COURT.

Money paid into court by a defendant is an absolute admission that so much is due upon the claim of the plaintiff and is so far a payment thereof, and the better opinion seems to be that the plaintiff may receive said deposit pending the litigation; and, in any event, he may prosecute his action for the remainder of his claim, subject to the risk of paying costs if he recover no more than the tender.

## In Admiralty.

*William H. Effinger*, for libellants.

*Benton Killin*, for defendants.

DEADY, D. J. The libellants, Ye Seng Company, composed of sundry Chinese merchants of this city, bring this suit to recover \$5,957.80 from the defendants, as damages, with interest, for the non-performance by them of a charter-party executed in this city on August 20, 1879, for the American bark Garibaldi. By the agreement "Messrs. Corbitt & Macleay, agent for owners of the American bark Garibaldi, of Portland, Oregon," of 670 tons burden, chartered

her "between-decks" to the libellants for a voyage from Hong Kong, China, to Portland, to carry "passengers and (or) freight" in number as permitted by the laws of the United States, upon the terms and conditions following: "The said vessel shall be tight, staunch, and strong, and in every way fitted and provided for said voyage;" the libellants to provide at Hong Kong the "passengers and freight as aforesaid, and furnish bunks, cook-houses, water-closets, and hatch-houses, and everything necessary to the carrying of passengers," and to pay the defendants "for the use of said vessel" during said voyage \$2,900,—one-half before the vessel left Hong Kong, and the remainder upon her arrival at Portland; but, "if no cargo and all passengers, full amount payable in Hong Kong."

The "lay days for loading at Hong Kong" were to be from March 1 to April 1, 1880, and any detention caused by either party was to be compensated for by the payment to the other of demurrage at the rate of \$50 per day. The charter-party contained the following stipulation: "To the true and faithful performance of all and every part of the foregoing agreement, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators, and assigns, each to the other, in the penal sum of amount of charter;" that is, \$2,900. It was also stipulated that "security" should "be given for the performance of this agreement in the sum of \$500," previous to the sailing of the vessel on her voyage to China. No attention seems to have been paid to this provision, except by the libellants, who, on February 26, 1880, advanced the defendants \$500 earnest-money on the voyage from Hong Kong to Portland, erroneously stated in the answer to have been paid before the bark left Portland for the former place. The agreement is signed by the libellant, Ye Seng Company, and the various mercantile firms that compose the adventure, and by "Corbitt & Macleay, agents for owners."

In October, 1879, the Garibaldi left Portland for Hong Kong, where she arrived about the end of that year. Hop Kee, a Chinese merchant at Hong Kong, was the agent of the libellants to deliver the cargo of freight and passengers, for which he was to receive a commission of 5 per centum. When the vessel arrived at Hong Kong shipping was scarce and coastwise freights were high. Soon after her arrival in port, and before January 31, 1880, the master, Thomas J. Forbes, informed Hop Kee that he would not be allowed to carry passengers out of that port on the Garibaldi; and on January 31st she was surveyed by R. McMurdo, the "surveyor for the government and local offices," who made and furnished the master a

certificate, over his signature and seal of office, containing a description of the vessel and the following statement under the head of "General remarks upon the vessel and character of the risk:" "Vessel docked and metaled at date under inspection of the undersigned; now tight and in order, but not a fit vessel to carry passengers." These facts were at once communicated to the defendants by cable and mail, and they instructed the master to do the best he could with her, and she went into the coasting trade, where she remained until she was disposed of in the following July.

On February 13, 1880, Nathaniel Ingersoll, who procured the charter for the libellants, wrote Forbes from Portland, enclosing a copy of the charter-party for the use of Hop Kee, and telling him that Ye Seng Company wished to be advised by mail when he was ready to sail for Portland.

On March 4, 1880, at the instance of Forbes, Hop Kee wrote across the face of the copy of the charter forwarded to him by Ingersoll, "This charter-party is cancelled in consequence of the emigration office of Hong Kong refusing to permit the Garibaldi to carry passengers," and signed the same "Hop Kee, agent for charterers;" and on the same date Forbes addressed a note to "Messrs. Hop Kee & Co., agents for charterers of Garibaldi," as follows:

"In consequence of the emigration office of Hong Kong refusing to permit my ship to carry passengers, I hereby certify that you have cancelled the charter-party, dated Portland, Oregon, twentieth August, 1879."

[Signed]

"T. J. FORBES, Captain Garibaldi."

The libellant contests the right of Hop Kee to cancel the agreement, and the counsel for the defendants admits that the evidence does not prove it. His agency appears to have been confined to the fulfilment of the charter at Hong Kong, without any authority to modify or cancel it. Nor will the law imply the greater authority from the less—the power to abrogate from the power to fulfil or carry out. *MacLachlan, L. of M. S. 360; Rich v. Parrott, 1 Spr. 358.* Nor is it clear that Hop Kee actually undertook to release the defendants from their obligation under the agreement, but only formally to admit the fact that as it had become impossible, as he understood it, for the defendants to perform their part of the contract, it was, in his judgment, practically at an end.

The answer of the defendants alleges that the Garibaldi, on August 20, 1879, was owned by the Ocean Ship Company, a corporation formed under the laws of Oregon, and that the defendants made said charter-party as the agents of said company and not otherwise, and

therefore they are not liable thereon; and on the trial it was admitted that such was the fact, and also that the stock of such corporation was substantially owned by the defendants Kenneth and Donald Macleay. But it also appears from the evidence that while defendants signed the charter-party as agents, they did not disclose the name of their principal, nor was it ever known to the libellant until after the commencement of this suit. Under these circumstances the liability of the defendants is undoubted. Although agents in fact, they have so dealt with the libellant as to render themselves liable as principals.

The rule of law upon the subject is clear and just. Story, in his *Agency*, §§ 266-7, says:

"A person contracting as agent will be personally responsible when, at the time of making the contract, he does not disclose the fact of his agency. \* \* \* The same principle will apply to contracts made by agents, when they are known to be agents and acting in that character, but the name of their principal is not disclosed; for until such disclosure it is impossible to suppose that the other contracting party is willing to enter into a contract exonerating the agent and trusting to an unknown principal, who may be insolvent, or incapable of binding himself."

To the same effect is the rule laid down in 2 Kent, 630; and it was expressly affirmed in *Winsor v. Griggs*, 5 Cush. 210.

In *Maclachlan, L. of M. S.* 355, it is laid down that one who executes a charter-party "in his own name, although he is agent for another, and notwithstanding he adds this, being merely a description of himself, whether in the body of the contract or after his signature, may sue or be sued thereon." But it was suggested by counsel on the argument that as the *Garibaldi* appears to have been an American vessel belonging to this port, an examination of the record of her enrolment in the custom-house would have shown the fact of her ownership, and that the libellant must be conclusively presumed to have known what he might have thus learned. No authority is cited in support of this proposition, and I can hardly think it was seriously made. In any event it is radically wrong, because it assumes that it was the duty of the libellant to ascertain who, if any one, was the defendant's principal. On the contrary, it was the duty of the defendants, if they did not want to be held personally liable on the contract, to disclose the name of their principal. However, in this case the application of the rule is not a serious matter, because the defendants—the Macleays and the Ocean Ship Company—are substantially one and the same person; they own their principal and are practically responsible for its debts and liabilities.



The libellants allege that they suffered damage by reason of the non-performance of the agreement by the defendant in this: That their agent Hop Kee had purchased, and was ready to deliver on said vessel before March 1, 1880, 2,440 mats of rice of 46½ pounds each, and 200 boxes of nut oil of 72 pounds each, and that they had disposed of the same, to arrive at this port per the Garibaldi, at a net gain of \$881.80—\$780.80 on the rice, and \$101 on the oil; and that before said date they had secured 265 passengers for the return trip of said vessel, at the rate of \$40 per head, and would have made upon the carrying of the same, after defraying all expenses of transportation, board, etc., the net profit of \$4,076; that they were compelled to expend \$500 in returning these passengers from Hong Kong to their respective homes, upon the failure or refusal of the defendants to take them to Oregon; and that freights were then so high that the libellants could not procure other transportation for said freight and passengers and realize any profit thereon. Unfortunately, Hop Kee died without his deposition being taken, and what he did in and about the carrying out of this contract is not clearly shown. However, upon the evidence in the case it does not appear that he purchased any rice or oil for the libellants, as alleged, for the reason, in all probability, that Forbes told him early in January, in effect, that the Garibaldi would not return to Portland. Neither is the evidence satisfactory as to the claim for \$500 alleged to have been paid for returning the proposed passengers to their homes. And, on the argument, I understood the counsel for libellants tacitly to abandon the claim for damages on these accounts. But it does appear from the evidence that Moy Toy and Fune Gib, who were passengers to Hong Kong on the Garibaldi, procured, as agents or runners for the libellants, 200 passengers for Portland, at \$40 apiece; but as the master of the Garibaldi had given Hop Kee notice that she would not make the voyage, he was compelled to decline to sell them tickets therefor.

It also satisfactorily appears from the evidence that there were no other means available to the libellants for transporting said passengers, and that the price of passage on the regular steamer to San Francisco was \$60 per head. The transportation of 200 passengers for \$2,900—the price of the charter—would cost \$14.50, and from the evidence it appears that it would cost not to exceed \$12 apiece more to board and take care of them on the voyage; so that it follows that the libellants stood to make \$2,800 net profit on the venture, and were only prevented from doing so by the failure of the

defendants to keep their contract and make the promised voyage. The libellants have at least sustained a loss of \$2,800 in gains prevented by this failure of the defendants to keep their contract, and in my judgment they are such damages as arise naturally from the breach of the contract, and must also be considered as within the contemplation of the parties thereto when they made it; and are, therefore, recoverable in this suit. *Hadley v. Baxendale*, 9 Exch. 341; *Griffin v. Colver*, 16 N. Y. 489; *Ogden v. Marshall*, 4 Selden, 340; Sedg. Dam. 79.

The stipulation in the charter that either party shall be liable to the other in the penal sum of \$2,900 upon a failure to perform any part of the agreement, was intended, in contemplation of law, not as a measure of damages, but as a penalty, to be enforced only to the amount of the actual damages sustained by such failure. *Harris v. Miller*, U. S. C. C. Dis. Or., March 8, 1880; Sedg. Dam. 399, 421, note 1. But this being a suit, not for the penalty, but upon the covenants in the contract for damages for a breach thereof, the amount recovered may exceed such penalty. *Lowe v. Peers*, 4 Burr. 2225; *Harrison v. Wright*, 13 East, 343; *Winter v. Trimmer*, 1 Black, 395; Abb. on Ship. 285; Sedg. Dam. 423.

In their answer the defendants allege that the parties were mutually released from the obligation of the charter-party by reason of the alleged cancellation of the same by the master and Hop Kee; but it not appearing that the latter had authority to make such cancellation, that defence is abandoned, and it is now insisted that the contract to furnish and receive freight and passengers on the Garibaldi at Hong Kong for Portland was a contract so far to be performed in the former place, and, being prohibited there, it was invalid, and therefore bound neither party to it. But this proposition assumes what is not proven. There is no evidence that it was unlawful to carry passengers out of Hong Kong on a suitable vessel—one that was "staunch and strong," and reasonably safe for them to venture their lives upon. The defendants expressly covenanted in the charter-party that the Garibaldi was such a vessel, and in such condition; and, if they had not, the law would imply a covenant on their part that the vessel was "fit" to do what they undertook to do with her—carry passengers out of Hong Kong. *Maclachlan*, L. of M. S. 406; *The Merrimac*, 2 Sawy. 593; *Lyon v. Mills*, 5 East, 428; *Stanton v. Richardson*, 9 C. P. 390; 1 Pars. Ship & Adm. 284. Nor was the duty and responsibility of the defendants in this respect affected by

the fact that the agent of the libellants for the negotiation of the charter may have known, or did know, the condition of the Garibaldi at the date of the charter-party, because he surveyed her a year before, or for any other reason. 1 Pars. Ship & Adm. 285, note 3. They undertook, without qualification or condition, that the vessel was "fit" not only to carry passengers generally, but also out of the port of Hong Kong, according to the laws and regulations thereof.

The Garibaldi appears to have been built at Stockton, California, in 1860, and had been engaged for some years in carrying passengers between Hong Kong and this port. By the survey at Hong Kong in January, 1880, she was found "not fit" to carry passengers, probably on account of weakness resulting from age. Hop Kee told the Chinese runners, when they came to him to purchase tickets for the passage out, that the Garibaldi would not take them because Forbes said she was too *old*. The certificate says she is "tight and in good order," but omits to say that she is "staunch and strong," as represented in the charter-party. And it may be that the master did not object to the vessel being found unfit to carry passengers to Oregon, if she was thereby free to engage in a more profitable trade on the coast of China, where, according to the testimony of Noyes, the mate, she earned \$1,400 in a voyage of a few days. Counsel for the defendants also object that the certificate of the marine surveyor is not competent evidence of the unfitness of the Garibaldi to carry passengers. But it was an official act procured by the defendants, upon the strength of which the emigration office, according to the written statement of the master delivered to Hop Kee, refused to permit the vessel to carry passengers out of the port. If the certificate is true, as *prima facie* it is, then undoubtedly the defendants failed to keep their agreement that "the said vessel shall be tight, staunch, strong, and in every way fitted and provided for said voyage;" and if it is not true, and the order thereon refusing to permit the Garibaldi to carry passengers was wrongfully made, the result is the same, because the defendants not only undertook that their vessel was in a condition to carry passengers out of Hong Kong, but that she would do so without any qualification or condition, as that she should be found qualified or permitted to do so by the local authorities.

In *Paradine v. Jane*, Aleyn, 26, the court said:

"When the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have guarded against it by his contract."

In *The Harriman*, 9 Wall. 172, the supreme court say:

"The principle deducible from the authorities is that if what is agreed to be done is possible and lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail the defendant. It must be shown that the thing cannot by any means be effected. The answer to the objection of hardship in all such cases is that it might have been guarded against by a proper stipulation;"

And cite with approbation *Blight v. Page*, B. & P. 295, where Lord Kenyon held that a charterer who agreed to load a vessel with barley at Liebeau, but did not, because the Russian government had forbidden the exportation of barley, was liable for the breach of his contract, saying:

"If a man undertake what he cannot perform, he shall answer for it to the person with whom he undertakes. I am always desirous to apply the settled principles of the law to the regulation of commercial dealings."

To the same effect is the ruling in the case of *West v. Steamer Uncle Sam*, MacAllister, 505, and the citations of comments in *Machlachlau*, L. of M. S. 543. But if this certificate and the letter from the master to Hop Kee of March 4th are not *prima facie* evidence of the facts that the vessel was found unfit to carry passengers, and the refusal thereon of the local authority to allow her to sail with them, what becomes of the defence that this contract could not be performed by the defendant because it was contrary to the law of the place of performance—Hong Kong? This certificate and letter are the only evidence of such illegality, and without them there would be no pretence of an excuse for the non-performance of the contract on the part of the defendants.

It is also alleged in the answer, and testified to by the master, that when he arrived in Hong Kong, Hop Kee told him that he had not secured any freight or passengers for the *Garibaldi*; and upon this it is claimed that the libellants were first in fault, and this was the controlling reason why the contract was considered at an end by the master and Hop Kee. But, admitting that Hop Kee had not secured any freight or passengers when or before the *Garibaldi* arrived at Hong Kong, it does not follow by any means that the libellants were therefore in fault in this matter. It was not agreed or expected that the freight or passengers would be engaged by the arrival of the vessel in December or January. Indeed, the libellants had until the first of April to load the vessel, and as much longer as they chose, by paying the demurrage agreed upon, while the defendants were not bound to be in port or receive cargo before the first of March.

It may be, then, that Hop Kee, when asked by the master in December or January, said he had not secured any freight or passengers, but that does not prove that he did not intend to or would not before the expiration of the lay days. How could he be expected to have procured a cargo when, so far as appears, his instructions to do so went out on the *Garibaldi*. That he did not afterwards procure the rice and oil, and accept the passengers that Moy Toy and Fune Gib had engaged in the mean time, was doubtless due to the fact that in a few days thereafter the master told him in effect that the vessel would not return to Portland.

The answer admits the liability of the defendants, as agents of the owners, to repay the \$500 received by them as earnest money; and therewith they brought into court \$562.23, that being the amount, with interest and costs of suit, to date,—December 3, 1880,—and “tendered the same to the libellants,” who received the amount from the clerk on December 23d. It is now contended that this sum was tendered in full of all claims in this suit, and that the acceptance of it by the libellants is a satisfaction of the whole claim and a bar to any further recovery.

A payment of money into court without a plea of a previous tender, operates as a tender from that date, and admits so much of the cause of action. But the plaintiff is not thereby precluded from prosecuting his action for the remainder of his claim, although he cannot recover costs if he fails to recover more than the sum tendered, and may be required to pay them. But whether the plaintiff may take this money out of court, pending the litigation, either by his own motion or by leave of the court, is a question. In *Alexandria v. Patten*, 1 Cranch, it was said by the court, without argument, that on a plea of tender the plaintiff cannot take the money out of court and proceed for more; and in 2 Pars. S. & A. 486, it is said: “The practice in the English admiralty is, when money is paid into court as a tender, not to pay it out until the conclusion of the case;” citing *The Annie Childs*, Lush. Adm. 509. But in *Murray v. Bethune*, 1 Wend. 191, it was held that when money is brought into court, pending an action for the same and more, it is a payment *pro tanto*, and the plaintiff has a right to take it out, but the defendant not. And this, in my judgment, is the more convenient and therefore the better rule. The deposit in court is an unconditional admission that such an amount is due, and a tender of the same and more; it is so far a payment beyond the power of the party to recall. See, also, *Spalding v. Vandercook*, 2 Wend. 431; *Sleight v. Rhineland*, 1 Johns. 202.

By reason of the failure of the defendants to perform their contract, the libellants have suffered damage, and are entitled to recover at least the \$2,800 gains which they were thereby prevented from making on the transportation of the 200 passengers engaged for the voyage, with interest from the date the Garibaldi might have completed the voyage to this port, say June 1, 1880, amounting in all to \$3,173.33 $\frac{1}{2}$ , with the costs and expenses of suit. There will be a decree accordingly.

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ESPEY, Jr., v. BLANKS.\*

(Circuit Court, E. D. Louisiana. November 18, 1881.)

1. CONTRACTS—EVIDENCE.

Parol evidence is inadmissible to alter the terms of a written contract.

In Admiralty.

*E. N. Whittemore*, for libellant.

*B. Egan*, for claimants.

PARDEE, C. J. This suit is brought on a bill of lading, and damages are claimed for the non-delivery of the freight in time at the place of consignment. The libellant makes out a case and proves \$102.45 damages by the deterioration of the goods and the expenses of telegraphing, and additional freight. There is no defence, except an alleged verbal instruction from the wharf-master to the clerk of the boat to make certain inquiries, and in a certain contingency to deliver the freight at another place than that named in the bill of lading. Objection is made to the introduction of evidence to sustain this defence, and the objection is well taken. See *The Thames*, 14 Wall. 98; also, *The Delaware*, 1d. 579, where the precise question is decided.

The judgment of the district court was manifestly right, and should be affirmed. Let a like decree as in the district court be entered in this case, with costs.

\*Reported by Joseph P. Horner, of the New Orleans bar.

**MEYER & HAY v. NORTON & CALHOUN.***(Circuit Court, D. Kentucky. November 15, 1881.)***1. REMOVAL OF CAUSES—ACT OF 1875.**

Within the meaning of the third section of the act of 1875, the petition for removal is filed in time, if filed at the first term at which, by the law and practice of that court, the cause could have been made ready and tried.

**2. SAME—SAME—TRIAL.**

There has been a trial, within the meaning of that act, if a judgment has been rendered in the state court sustaining a demurrer to the answer put in in the suit there, and dismissing a cross-petition with costs.

**BARR, D. J.** This action was commenced on the fifteenth of December, 1874, in the Louisville chancery court, by Mayer & Hay against the Louisville, Paducah & Southwestern Railroad Company, and certain subscribers to its capital stock.

The plaintiffs had judgments against said company, upon which executions had been issued and returned "no property found," and they sought to subject to the payment of their judgments certain unpaid subscriptions to the capital stock of the company. They had process of garnishment issued and served, and they also made the subscribers to the stock parties defendant. One of the defendants pleaded that Norton & Calhoun, to whom the company had made a mortgage on its property to secure three millions of dollars which had been issued in coupon bonds, had a claim on the unpaid stock subscription, and required that they be made parties. This was done by an amended petition, filed April 12, 1875, and Norton & Calhoun entered their appearance, and without filing answer moved the court to remove the cause to the United States circuit court. The petition for removal was filed the fourth of June, 1875. Previous to that time, in April, 1875, Norton & Calhoun had filed in this court a suit for the foreclosure of the mortgage executed to them on the road and its property, and when the cause was removed to this court it was consolidated with the suit already pending. This mortgage was dated March 1, 1870, and suit for its foreclosure was brought April 25, 1875. The cause remained in this court until October 2, 1877, when it was remanded to the state court; this court making the following order:

*"Meyer & Hay v. L., P. & S. W. R. Co.*

"This day came Eckstein Norton and Philo C. Calhoun, by H. C. Purdell, their counsel, and on their motion it is ordered that this cause be, and the same is, hereby remanded back to the Louisville chancery court, from whence it came."

Norton & Calhoun filed their answer and cross-petition on the nineteenth of October, 1877, in which they claimed the unpaid subscription to the capital stock of the L., P. & S. W. R. Co. as being included in the mortgage, and asked that the unpaid stock subscription of certain parties, who were made defendants in the cross-petition, should be decreed to them as trustees under the mortgage. Meyer & Hay filed a demurrer to this answer and cross-petition, which was sustained by the Louisville chancery court, and as they failed to

answer further their cross-petition was dismissed, with costs. They appealed to the court of appeals, where, after some delay, it was decided and the judgment of the lower court was reversed and the cause sent back for further proceeding, in conformity with an opinion then rendered. The mandate of the court of appeals was filed in the Louisville chancery court on the — day of May, 1881, and an order entered overruling the demurrer to the answer and cross-petition of Norton & Calhoun. Meyer & Hay filed a reply to this answer and cross-petition on the — day of May, 1881, and Norton & Calhoun filed, on the twenty-first of June, 1881, an amended answer and cross-petition, and a rejoinder to the reply. This rejoinder required a surrejoinder, and the amended answer and cross-petition a reply.

The Code allowed two weeks' time within which Meyer & Hay could file their reply and surrejoinder. These pleadings could have been filed in the clerk's office with the same effect as in court. Sections 810 and 811. After the issues are made up, 30 days are allowed within which proof may be taken. Section 818. The Louisville chancery court took its usual vacation from the — day of July, 1881, to September 23, 1881, as appears from an agreement of facts filed by the parties in this court. Meyer & Hay filed their petition in the Louisville chancery court September 24, 1881, asking a removal of the cause to this court, and tendered the proper bond. That court accepted the bond, and ordered the cause to be transferred so far as there was a controversy between Meyer & Hay and Norton & Calhoun. This transcript has been filed in this court, and Norton & Calhoun moved to remand the cause to the state court.

The learned counsel have urged several grounds for this motion, but it will only be necessary to notice two of them. The third section of the act of 1875 requires the petition for a removal of a cause from a state court to this court shall be "before or at the term at which said cause could be first tried, and before the trial thereof." It is insisted that by the rules and practice of the Louisville chancery court, that this cause could have been tried upon the issues as now formed, or upon issues which should have been joined before the twenty-fourth of September, 1881, and hence the petition for removal was too late.

The construction of this language in the act of 1875 is not uniform in the various circuit courts. It does not, I think, mean the term of court when the parties are first ready to try the cause, nor does it mean the term of court when the issues are first joined; but it means that term of court at which, by the law and the practice of that court, the cause *could have been first tried*. The cause may not in fact be ready for trial, but if, by the law and the practice of the court where



the cause is pending, the cause could have been made ready and tried during a term, that is the term which the act indicates as "the term at which said cause could be first tried." *Gurnee v. County of Brunswick*, 1 Hughes, 270; *Forrest v. Forrest Home*, 1 FED. REP. 459; *Blackwell v. Braun*, Id. 351; *Murray v. Holden*, 2 FED. REP. 740; *Ames v. Colorado Cent. R. Co.* 4 Dill. 260.

The supreme court, in *Babbitt v. Clark*, 103 U. S. 606, has, I think, authoritatively construed the language, in the third section of the act of 1875, as meaning that the petition for removal must be filed and motion made "at the first term in which the cause is in law triable." The court say, through the chief justice:

"The act of congress, 1875, does not provide for the removal of a cause at the first term at which a trial can be had on the issues, as finally settled by leave of court or otherwise, but at the first term at which the cause, as a cause, could be tried. \* \* \* Under the acts of 1866 and 1867 it was sufficient to move at any time before actual trial, while under that of 1875 the election must be made at the first term in which the cause is in law triable." Page 612.

The Louisville chancery court has no terms, but is, in theory at least, always open for the trial of causes. Section 771, Code. It is the custom, and has been from the establishment of the court, for the court to take a summer vacation, commencing in July and running until the latter part of September of each year. The agreement of facts filed shows that the court took the usual vacation, which continued until September 23, 1881. If the time of the summer vacation be counted, the issues could have been made, and the time for taking proof, which is 30 days, would have expired before and in time to have placed this cause on the trial docket, which was called September 23, 1881. I am inclined to the opinion, however, that the time of vacation should not be counted in estimating the time when the issues should have been made up, because, by the practice of the Louisville chancery court, the summer vacation is intended as a vacation for the bar as well as the court. I need not, however, decide this point, as I think this objection is not available for another reason.

The language of the act of 1875 does not, in terms, apply to courts like the Louisville chancery court, which have no stated terms and are always open for the transaction of business. We should, however, apply the act to all courts if possible. We cannot apply the letter of the act, but should its spirit. In those courts that have stated terms a petition and motion for removal is in time at any

time during the term in which the cause "could be first tried, and before the trial thereof." This right exists during the term of the court without regard to the length of the term. Hence, in applying the act of 1875 to the Louisville chancery court, if there is any period of time which is regarded in the law as equivalent to a term of that court, the right to file a petition and have a removal to this court should continue during such period.

The Kentucky Code (section 772) provides that the Louisville chancery court "shall have such control over its judgments for 60 days as circuit courts have over their judgments during the term in which they are rendered." Litigants may, I think, file their petition for removal under the act of 1875, in the Louisville chancery court, before the trial of a cause, and within 60 days after the cause is first triable by the law and practice of that court. This is a reasonable rule, and one which is clearly within the spirit of the act of 1875; and, as the removal in the case under consideration is within that time, I conclude the objection urged is not well taken.

It is also insisted that the judgment of the Louisville chancery court sustaining the demurrer to Norton & Calhoun's answer and cross-petition, and dismissing them with costs, was a trial within the meaning of the act of 1875, and therefore the petition for removal was filed in this case after the first trial, and is too late. A trial is defined in the Kentucky Code to be "a judicial examination of the issues of law or of facts in an action or proceeding." Section 311.

This definition, however is not conclusive upon this court in ascertaining the meaning of the word "trial" as used by congress in the act of 1875. The learned chancellor has, notwithstanding this definition, decided in this case that the judgment of the court upon the demurrer was not a trial within the meaning of the act of 1875, and although that opinion is strong, persuasive evidence of the meaning of "trial," it is not authoritative. This court is obliged to decide for itself, on this motion, the meaning of "trial" as used in the act of 1875.

The act of July 27, 1866, used the words "trial or final hearing," and the act of March 2, 1867, used the words "final hearing or trial," and only required that the petition for removal and bond shall be filed before that time. The act of 1875 has dropped the words "final" and "hearing." "Trial," in this act, (1875,) must include a "hearing," as used in the equity practice. The trial, as expressed in this act, may or may not be in fact a "final trial," but to be a trial it must be such a proceeding as may give the court where it is the right to

determine that litigation and enter a judgment, which will, for that court and in that proceeding, be a final determination of the rights of the parties to the issue or issues, whether those issues be issues of fact or of law, or both law and fact.

The demurrer, in this case, admitted the allegations of the answer and cross-petition, and the court decided that the stock subscriptions did not pass under the mortgage, and dismissed Morton & Calhoun out of court, and gave judgment for costs against them. This was a judgment which determined their rights, and, if unreversed, would have forever barred their rights as against the parties to that suit.

Blackstone defines a trial to be "the examination of the matter of fact in issue in a cause." This is the meaning of "trial" at common law, but is too narrow a meaning to apply to "trial" as used in the act of 1875.

In *U. S. v. Curtis*, 4 Mason, 232, Judge Story, in a criminal case, decides that "trial," in section 29 of the act of 1790, meant where the jury was sworn, and that the trial did not commence when the prisoner was first arraigned to answer the indictment. That distinguished jurist, in that opinion, uses the language:

"The reasons that lead us to this conclusion are—*First*, that this is the natural exposition of the intent and object of the enactment; and, *secondly*, that it is the legal and technical meaning of the word 'trial' in the sense of the common law. It is admitted that the legislature may use technical words in an untechnical sense, and when from the context this is ascertained, it is the duty of the court to construe the words according to the legislative intent. It is equally its duty to follow such intent, when the legislature uses untechnical words in a technical sense. In each case, indeed, the duty of the court is the same,—to carry into effect the object of the legislature, so far as it is expressed, and to give a *suitable exposition* of the terms according to the *fair import of the language*."

It would not be proper to confine the word "trial," as used in the third section of the act of 1875, to trials as understood at common law, because it applies to "any suit of a civil nature at law or in equity," and because there are many suits in which no issues of fact are made, and yet the rights of the parties are ascertained and finally determined by the court. Indeed, there are issues of fact in suits which do not determine the cause or the rights of the parties, even in the courts in which they are decided.

Judge Dillon, in his book on the Removal of Causes, § 65, says:

"It has been held, under the act of March 3, 1875, that the application for removal must be made before the trial on its merits, or on a question which results in a final judgment or decree, commences."

He refers to *Lewis v. Smythe*, 2 Wood, 117. This authority is not quite up to the text, but Judge Wood, in his opinion, uses this very suggestive language:

"By the word 'trial,' as used in this statute, (1875,) I do not understand the argument, investigation, or decision of a question of law merely, *unless it is decisive of the trial, and the decision results in a final judgment or decree.* The decision of a court, on a demurrer, for instance, or on exceptions to the sufficiency of a plea, which is followed by amendment or new pleadings, and which does not cure the case, is not the trial meant by the statute."

If, however, the decision of the question of law does, as in this case, end the case in a final judgment, would it not, in the opinion of the learned judge, have been a trial within the meaning of the act of 1875?

We conclude that the removal in this case was not before the first trial, and the case should, therefore, be remanded.

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BROOKS v. BAILEY.

(Circuit Court, D. Vermont. October Term, 1881.)

CIRCUIT COURT JURISDICTION—CITIZENSHIP.

In a suit which has been brought in a circuit court of the United States, it is immaterial, so far as the jurisdiction of the court is concerned, of what one of the states the plaintiff is a citizen, provided the parties are citizens of different states.

In Equity.

*Eleazer R. Hard*, for plaintiff.

*George Wilkins and Henry Ballard*, for defendant.

WHEELER, D. J. This is a bill in equity in which the orator sets himself up as of Boston, in the state of Massachusetts, and a citizen of that state, and the defendant as of Stowe, in the state of Vermont, and a citizen of that state. The defendant has pleaded that at the time of the bringing of the bill he was, and now is, a citizen of the state of New Hampshire, and that neither he nor the orator then was or now is a citizen of the state of Vermont; and this plea has been argued. By the provisions of the constitution the judicial power of the United States was made to extend to controversies between citizens of different states. Article 3, § 2. By the judiciary act of 1789, congress conferred upon the circuit courts jurisdiction of all suits of a civil nature, at common law or in equity, of the required amount, between a citizen of the state where the suit is brought and a citizen of another state. Chapter 20, § 11; 1 St. at Large, 78.

At the same time, it was provided that no civil suit should be brought therein against an inhabitant of the United States by original process in any other district than that whereof he should be an inhabitant, or wherein he should be found, at the time of serving the writ. *Id.*

These provisions continued in force until the act of March 3, 1875. Rev. St. § 629; *Id.* § 739. The former was the law which conferred jurisdiction in this class of cases; the latter was a limitation upon the place where suits might be brought for the ease of defendants. Both were operative in determining where the place might be. *McMicken v. Webb*, 11 Pet. 25. The act of March 3, 1875, extended the jurisdiction to all suits of a civil nature, at common law or in equity, of the required amount, in which there should be a controversy between citizens of different states, without limiting it to depend at all upon citizenship of either party in the state where the suit should be brought; but retained the limitation upon the bringing of suits in other districts than that whereof the defendant should be an inhabitant or in which he should be found. It has been argued that because this limitation is in substantially the same language in the act of 1875 that it was in the act of 1789, it must receive substantially the same construction that it had always borne. This would be correct if it were to be applied to the same jurisdiction otherwise conferred; but it is not. This provision in the act of 1789 was only to be applied in determining in which district of the two states, between whose citizens jurisdiction of suits was given, the suit must be brought. In the act of 1875 it is to be applied in determining in which district of all the states, between the citizens of any two of which jurisdiction of suits is given, the suit must be brought. Under the latter act this court, in common with other circuit courts, has jurisdiction of all suits, of the required amount, between citizens of different states among all the states, while under the former it had jurisdiction only of suits between citizens of this state and those of some other of all the states. The suit could be brought only in the district where the defendant resided or was found, under either. That this defendant was found in this district when the process was served is not denied, and therefore the right to bring the suit in this district is not denied.

Plea overruled. Defendant to answer over by January rule-day.

*In re SIMS, Bankrupt.**(District Court, N. D. Ohio, E. D. November 26, 1881.)***1. BANKRUPTCY—DISCHARGE—APPLICATION TO ANNUL—AMENDMENT.**

An application for leave to contest the validity of a discharge in bankruptcy cannot be amended, after the expiration of two years from the date of the discharge, by adding another of the acts mentioned in section 5110 of the Revised Statutes to those already specified in the application.

*J. E. Ingersoll*, for Henry Nottingham.

*W. F. Carr*, for bankrupt.

WELKER, D. J. On the eighteenth day of December, 1878, the petitioner was granted a final discharge in bankruptcy in this court. On the thirteenth day of December, 1880, Henry Nottingham, a creditor of said petitioner, and having a provable debt, and one that had been regularly proven, filed an application in writing, desiring to contest the validity of the discharge on the ground that it was fraudulently obtained, and asking this court to annul the same. The application specified several of the acts mentioned in section 5110 as grounds for refusal of discharge, and which he intended to prove against him, setting forth the grounds of each particularly and specifically. The bankrupt denied each of the grounds. Before the final hearing of the application to set aside the discharge, on the third day of August, 1881, more than two years after the discharge was thus granted, Nottingham makes an application to amend his original application for annulling the discharge, by adding thereto another of the grounds for refusing a discharge contained in section 5110, to-wit, the eighth: That he had procured the assent of certain of his creditors, and influenced their action in consenting to his discharge by a pecuniary consideration, and specifically setting out the particulars thereof.

The application for leave to amend is objected to by the bankrupt, and the question is made, shall the amendment be allowed? Section 5120 provides:

"Any creditor of a bankrupt, whose debt was proved or provable against the estate in bankruptcy, who desires to contest the validity of the discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to annul the same. The application shall be in writing, and shall specify which in particular of the several acts mentioned in section 5110, it is intended to prove against the bankrupt, and set forth the ground of avoidance; and no evidence shall be admitted as to any other of such acts, but the application shall be subject to amendment, at the discretion of the court."

It will be observed that the application to annul must be made within two years from the discharge, and shall be in writing, and shall specify which in particular of the several acts mentioned in the section is intended to be proved against the bankrupt, and shall set forth the grounds of such avoidance. The application must contain these requisites, and the evidence must be confined to the grounds set out therein.

What are we to understand by the term "subject to amendment," used in the section? Does it mean that other and different causes specified in section 5110 may be added, as they may be discovered from time to time, after the lapse of two years, and while the matter is still pending? An amendment is the correction of errors committed in the progress of a cause. It may be in the statement of the cause of action, in its form, and it is allowed to make more definite and certain a defectively-pleaded cause of action. It is not allowed to make an entirely new case. A new case is not to be regarded as an amendment. This amendment, it seems to me, was only intended to be allowed to make some of the causes named in the section, and such as may have been defectively set out in the application, more definite and certain, and not new grounds named in the statute. The limitation was fixed that after that time the bankrupt could not be compelled to again contest his discharge, otherwise it could be done at the pleasure of the creditor. There are 10 grounds for opposition to discharge named in section 5110. If the construction be as claimed by the applicant, to annul the discharge, he could within two years allege one ground, and, by way of amendment, from time to time afterwards, add one at a time until all were named, if the court, in the exercise of its discretion, would allow it, and thus practically deny to the bankrupt the benefit of the limitation. It was evidently intended that the creditor should, in his application to be made within two years, set out all his grounds for annulling the discharge, and to confine the hearing to them; but, if defectively set out, the court may allow amendment to make them more certain. To allow the amendment would be to entirely annul the limitation of the statute, and thereby attempt judicially to repeal it.

The motion is therefore refused.

UNITED STATES *v.* HAMILTON.*(District Court, D. Indiana. December 7, 1881.)*

## 1. POST-OFFICE EMPLOYEES—EMBEZZLEMENT, ETC., OF LETTER BY—SECTION 5467, REV. ST., CONSTRUED.

It is not material, under section 5467, Rev. St., how a letter intended to be conveyed by mail comes into the possession of a post-office employe.

Indictment under section 5467, Rev. St. Motion for new trial.

*Chas. L. Holstein*, U. S. Atty., and *Chas. H. McCarer*, Asst., for the United States.

*T. S. Rollins* and *S. T. McConnell*, for defendant.

GRESHAM, D. J. The indictment was based upon section 5467, Rev. St., and charged that the defendant, being a post-office employe, stole and took out of a certain letter, which had come into his possession and which was intended to be conveyed by mail, before it had been delivered to the party to whom it was addressed, a certain article of value, describing it. There was a verdict of guilty.

A motion for a new trial is made, upon the ground that the evidence does not show that the letter was legally in the custody of the postal service, or that the defendant came into the possession of it in the regular course of his official duties.

It appears from the evidence that the defendant was the local mail agent at the depot at Attica, Indiana, and as such had the care and custody of the mails there. He had taken the usual oath of office for the faithful performance of his duties, but received no compensation from the government. He was also in the service of the railroad as station agent and telegraph operator at the depot. As local mail agent he received the mail-bags, etc., from, and delivered them to, the trains, and was also in the habit of receiving letters from individuals for delivery to the route agents. One Ambrose Rank was the telegraph messenger boy at the depot. He, too, was in the habit of receiving letters from individuals for mailing at the depot and on the trains. The letter described in the indictment was from Nave, Allen & Co., an Attica firm, and was directed to a person at La Fayette, Indiana, and contained a draft for \$30. This letter was handed by a member of the firm to young Rank, to be mailed at the depot. Rank swore that he delivered the letter, just as he received it, to the defendant, at the depot, for mailing on the train. It never reached its destination and was never found. A few days after its delivery to the defendant he disposed of the draft and spent the money at La Fayette. The defendant testified, in his own behalf, that he never



received the letter from Rank or otherwise, and that he bought the draft from him for \$10. There was evidence tending to corroborate Rank's statement.

It is declared, by the section under which the indictment is drawn, to be an offence for any person employed in any department of the postal service to steal or take any article of value enumerated in the statute from any letter intended to be conveyed by mail, which comes into his possession "either in the regular course of his official duties, or in any other manner whatever," provided the same has not been delivered to the party to whom it is directed. If the defendant received the letter, as testified to by Rank, knowing that it was intended to be conveyed by mail, and that it had not been delivered to the person to whom it was directed, and the defendant opened it and stole the contents, he is guilty. It is not material how a letter which is intended to be conveyed by mail comes into the possession of a person employed in the postal service. A local mail agent, such as the defendant was, who receives a single letter to be delivered to a mail agent to be conveyed to its destination through the mails, is entrusted with mail matter, within the meaning of the statute; and he is just as guilty, if he opens and steals the contents of such a letter, as if he had stolen the contents of a letter taken unlawfully from a mail-bag or packet with which he was entrusted.

Motion for new trial overruled.

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UNITED STATES v. SIMS.

(District Court, N. D. Ohio, E. D. December 3, 1881.)

1. EMPLOYMENT OF UNLICENSED ENGINEERS—REV. ST. § 4438.

An indictment under Rev. St. § 4438, which provides that it shall be unlawful to employ any person, or for any person to serve, as a master, chief mate, engineer, or pilot on any steamer, who is not licensed by the inspectors, need not charge that the employment was with knowledge that the employe had not been licensed as the statute required.

*Charles L. Fish*, for defendant.

*Edward S. Meyer*, Dist. Atty., for plaintiff.

WELKER, D. J. The indictment charges the defendant with violation of section 4438, title 3, of the "Act for the regulation of steam-vessels," in employing an engineer on the tug of the defendant who was not licensed as required by the statutes. Plea not guilty, and a verdict of guilty by the jury. The defendant files a motion in

arrest of judgment, because the indictment does not charge a violation of the statute. The defect relied upon in the motion is that the indictment does not aver that the defendant knew, at the time he employed the engineer to serve on the tug, that the engineer was not licensed by the proper inspectors, as required by the statute. The section provides that—

“The board of local inspectors shall license and classify the masters, chief mates, engineers, and pilots of all steam-vessels. It shall be unlawful to employ any person, or for any person to serve, as a master, chief mate, engineer, or pilot on any steamer, who is not licensed by the inspectors, and any one violating this section shall be liable to a penalty of \$100 for each offence.”

The indictment does not aver knowledge of defendant that the engineer was not licensed. The only question made by the motion is whether it is necessary to make this averment in the indictment.

In construing this section it is important to bear in mind the object and purpose of this statute for the regulation of steam-vessels, and the important duties of the engineer in their navigation. These regulations are for the protection of the lives of those engaged in navigation, as well as the traveling public, and the property that may be carried upon these vessels; they provide for the safety of this branch of the water-carrier business.

Section 4441 provides that the inspector shall examine the applicant for license as an engineer as to his knowledge of steam machinery, his experience as an engineer, and the proofs he produces, and if satisfied that his character, habits of life, knowledge and experience in the duties of an engineer are such as make him a suitable and safe person to be entrusted with the powers and duties of the station, he shall grant him a license, and such license is revocable for negligence, unskilfulness, or intemperance. These regulations also require the engineer, when employed on a vessel, to place his certificate of license in some conspicuous place in such vessel, where it can be seen by passengers at all times.

These references to the statute show the importance attached to qualifications and skill of this class of officers. It will be observed that section 4438 does not state that it shall be unlawful to knowingly employ such unlicensed engineer. Some of the preceding sections do state that certain acts shall be intentionally done to incur the penalty. If such knowledge was intended as an element of the offence it would have been so written, and not left for inference. As far as possible it is the duty of the court to carry out the purpose and intent

of congress in the establishment of these regulations. If it be required that owners of vessels must be shown to know that the man he employs as an engineer is not licensed, the public loses the protection intended to be afforded by these regulations, as the owner can employ any one and say he did not know he was not licensed, and need not inquire. The purpose of this section is to require him to know that such license has been obtained, and he employs him as an engineer at his peril if he be not in fact so licensed. Therefore, it is not necessary to aver in the indictment, or prove on the trial, such knowledge on the part of the employer to make him liable to the penalty of the statute.

The motion is overruled.

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SHARP v. REISSNER and others.

(Circuit Court, S. D. New York. October 5, 1881.)

1. LETTERS PATENT—PLEADING.

In a suit for the infringement of a patent, a plea which sets up the single defence of non-infringement will be stricken out on motion.

*Briesen & Betts*, for plaintiff.

*W. H. L. Lee*, for defendants.

BLATCHFORD, C. J. The bill in this case is brought for the infringement of a patent. The bill alleges that the defendants, without the license of the plaintiff, and in violation of his rights, and in infringement of the patent, did "make, construct, use, and vend to others to be used, the said invention, and did make, construct, use, and vend to others to be used, hydrocarbon stoves made according to, and employing and containing, said invention," and "have made and sold, and caused to be made and sold, large quantities of said hydrocarbon stoves." Two of the defendants have put in a plea to the bill, which sets forth "that neither they, nor either of them, have, since the issuing of the letters patent set forth in said bill, ever made, constructed, used, or vended to others to be used, the invention described in said letters patent, \* \* \* or made, constructed, used, or vended to others to be used, hydrocarbon stoves made according to, and employing and containing, said invention." The plea also denies that the defendants, "or either of them, have ever infringed upon or violated any exclusive right secured by said letters patent in any manner whatever." There is nothing else in

the plea, and there is no answer to the bill or to any part of it. The plaintiff moves that the plea be stricken from the files as improper, or else be ordered to stand as an answer.

The defendants show by affidavits that they are advised and believe that the stoves they have made were not infringements of the patent sued on; that by the advice of their counsel, and for the purpose of avoiding expense to both parties, the single defence of non-infringement was interposed in the form of a plea; that the defendants have other defences which they wish to embody in an answer, should it be necessary for them to answer, the most important of which defences are prior patents anticipating the plaintiff's patent, and also limiting its scope so as to render infringement impossible, and prior knowledge on the part of various individuals; and that to take evidence in regard to all such prior patents and prior knowledge would be very expensive to both parties. The defendants contend that the plea is a proper one; that it was not necessary for the plea to be supported by an answer, even under the old equity practice; that under the equity rules prescribed by the supreme court of the United States, no plea is to be accompanied by an answer, except where fraud or combination is alleged in the bill; and that, even if the plea be defective in form or substance, or if it should have been supported by an answer, the plaintiff has mistaken his remedy.

No authority is cited where a plea like the present one has been put in or allowed in a suit for the infringement of a patent. By equity rule 34, if a plea is overruled, either on an issue of law or an issue of fact in regard to it, the defendant has an absolute right to put in an answer to the bill, or to so much thereof as is covered by the plea. By equity rule 39 a defendant has a right, in all cases, to insist by answer upon all matters of defence (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar. If the present plea should be tried on the fact of infringement, and the issue be found for the plaintiff, and the plea be thus overruled, it would seem difficult, under the above rules, to exclude defendant from contesting again, under an answer, the question of infringement, especially as, under the issues raised by an answer, and under the light thrown on the subject by the proofs on the issue on the plea, and under new proofs on the issues on the answer, the question of infringement might be presented in a very different light from that in which it was presented on the trial of the issue on the plea, and in one much more favorable to the

defendants. Indeed, the defendants' affidavit on this motion states that they will desire, by answer, to put in prior patents, to limit the scope of the plaintiff's patent, so as to render infringement impossible. It is difficult to see how they are to be prevented from doing this by answer, after the overruling of their plea. The question of the infringement of a patent depends very much on the construction of its claims, and that depends very much on prior patents on the same subject. If such prior patents are to be put in, they ought to be set up in an answer, and be put in once for all, and the issue of infringement ought to be tried but once, and under an answer, and not under a plea. The defendants think they will succeed on the question of infringement; but the plaintiff thinks otherwise. If the defendants succeed, expense will have been saved by having no other issue but that on the plea. But if the plaintiff succeeds on the plea, he must, to realize his success, go through a second litigation on the same question, and no expense will have been saved. The one result is now to be contemplated quite as much as the other. Within the principles laid down in *Rhode Island v. Massachusetts*, 14 Pet. 210, it would be unjust to the plaintiff to permit the issue of infringement to be determined on the plea.

Besides this, none of the adjudged cases sanction, in a suit like this, a plea merely of non-infringement, under rules of practice such as those which govern this case. On the contrary, the authorities condemn such a plea. *Bailey v. Le Roy*, 2 Edw. Ch. 514; *Black v. Black*, 15 Ga. 445; *Milligan v. Milledge*, 3 Cranch, 220.

It is only when a plea is unexceptionable in its form and character that it is to be set down for argument, or to be replied to. *Rhode Island v. Massachusetts*, 14 Pet. 210, 257. The motion to strike this plea from the files as improper is a correct motion, and must be granted, with leave to the defendants to answer in 30 days, on payment of costs.

PUTNAM *v.* LOMAX.

(Circuit Court, N. D. Illinois. October 7, 1881.)

## 1. LETTERS PATENT—MEASURE OF DAMAGES.

The profits of which the patentee is deprived by the manufacture or use of the device, only a single element of which is covered by his patent, constitute the measure of his damages.

Exception to Master's Report.

*J. P. Altgelt*, for complainant.

*Charles E. Anthony* and *West & Bond*, for defendant.

BLODGETT, D. J. This was a suit brought by the complainant against the defendant for an infringement of a patent issued to the complainant, and reissued January 19, 1864, for an improvement in wire bottle-stopper fastening. On the hearing the defendant was adjudged to infringe complainant's patent, and reference was made to a master to hear proofs, and report the profits which had accrued to the defendants by the use of complainant's patent, and to ascertain and report the damages which complainant had sustained thereby. The master has reported, finding amount of profits made by defendant by use of complainant's device, within the time in controversy, to be \$3,585.11. To this report defendant has filed seven exceptions.

All these exceptions relate to the amount which complainant is entitled to recover from defendant for the alleged infringement of his patent.

The master found that the defendant had made over 4,000 gross of the fastenings in violation of the complainant's patent; that complainant was in the business of manufacturing fasteners to supply the trade; and that his profits were 86½ cents per gross for the goods at his factory. He therefore fixed the defendant's profits at what would have been the complainant's profits if defendant had bought of him.

The claim of this patent, which was sustained by the court in this case, and has been construed and sustained in several other cases by different courts, is "for the U-shaped fastener made of wire, with the ends returned and connected to the bottle in order that the pressure on the cork may cause the fastener to hold more securely, as specified;" and it is urged that as the U-shaped fastener alone does not make the complete instrument or device, but is only one part or element of the device, the profits on the whole fastener (part of which is not covered by complainant's patent) do not furnish a rule for the

measure of the profits made by defendant, or of complainant's damages.

Proof shows that the defendant is engaged in the business of bottling mineral waters, beer, etc., and uses these stopper-fastenings in his business, and also that he has sold some to the trade. It also appears that the complainant was engaged, during the term of infringement, as a manufacturer of these bottle-stopper fastenings under his patent, and had ample facilities to supply the entire demand of the trade for these fastenings.

A patentee has the right to the monopoly given him by his patent, and may exercise that right, either by the exclusive manufacture of his patented article, or he may license others to manufacture on such terms as he chooses, or may sell his patent within certain territory.

There is no proof that the complainant had established a license fee or royalty for the use of his patent, and the fair conclusion from the proof is that he was deriving his profits solely from the manufacture and sale of the article covered by his patent. If the defendant manufactured for his own use, or for sale, he so far interfered with the complainant's sales, and so far damaged complainant's business. It may, perhaps, also be said, with entire accuracy, under the proof, that defendant, by being his own manufacturer, made a profit to whatever amount he saved over and above what he would have paid if he bought of complainant. Technically, I think, the proofs tend more directly to show complainant's damages than defendant's profits; but I do not deem it necessary to criticise the report in that particular, as it furnishes the data upon which the court can act intelligently, and the criticism is more upon the verbiage than on the substance of the report.

The report shows how many of these fastenings were made and used by defendant, and shows that if he had not pirated upon complainant's patent he would have been compelled to buy of complainant, and therefore shows how much complainant was damaged.

As to the point that only part of the fastener is covered by the patent, I deem it enough to say that defendant used what was covered by the patent. If he had not used the wire U-shaped yoke, but had used the tin yoke, which is said to have been old and not subject to patent, there would have been no infringement. The mere fact that to make an operative fastener under the Putnam patent required a wire collar or band around the neck of the bottle, or some device for attaching the fastener to the bottle, does not seem to me to cut any

figure in this case. Nearly every patented device, in order to apply it or make it operative, requires the use, in connection with what is covered by the patent, of something which is old, as in this case. Something to attach the yoke or bail to the neck of the bottle is necessary, and the proof shows the complainant and defendant both made these fasteners complete, with the wire collar or band to go around the neck of the bottle, so that it could be applied ready for use by merely closing the collar around the neck. In manufacturing his fasteners thus ready for use, complainant made the profit found by the master, and it is no answer to complainant's claim for damages that every operative part of his fastener was not covered by his patent. He made them according to his patent, and sold them. The defendant, instead of buying from complainant, made his own fasteners in complete similitude of complainant's patent, and thereby damaged the complainant.

In other words, the complainant, by making fasteners complete for use under his patent, made a profit, and the defendant, by wrongfully using complainant's patent, deprived him of a portion of the profits which he would otherwise have made.

The exceptions are overruled, the report of the master confirmed, and a decree will be entered fixing the complainant's damages at \$3,585.11, to be paid with interest from the date of the report.

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EDGARTON and others v. FURST & BRADLEY MANUF'G Co. and others.

(Circuit Court, N. D. Illinois. July 19, 1881.)

1. LETTERS PATENT—HORSE HAY-RAKES.

Letters patent granted to George Whitcomb, October 5, 1858, for an improvement in horse hay-rakes, are invalid because the improvement was in public use more than two years prior to the application for a patent.

2. COMITY.

Circuit courts will follow the decisions in other circuits, only where the same questions were raised on substantially the same evidence.

3. DISCLAIMER—REISSUES.

A patentee cannot claim in a reissue what he disclaimed in the original.

4. CLAIMS—VOID FOR UNCERTAINTY.

Claims must be certain. Therefore, the claim for the arrangement of the rake-head, E, and foot-treadles, H J and G K, or either, in relation to each other, and the axle, B, substantially as and for the purpose described, is void for uncertainty, because it does not appear whether the patentee intended to cover, by this claim, the two treadles working together for their different purposes, or whether he intended to cover each one as a separate device.



*Thomas H. Dodge*, for complainants.

*West & Bond*, for defendants.

BLODGETT, D. J. These two suits are for infringement of letters patent issued on the fifth day of October, 1858, to George Whitcomb, for an improvement in horse hay rakes. The patent was reissued June 16, 1868, in two parts, as reissues No. 2,994 and 2,995, and on the fifth of October, 1872, was extended for a further term of seven years.

The first suit is brought by the owners of the original term, and the second by the owners of the extended term.

The defences set up are:

*First*, the invalidity of the reissued claims involved in this suit; *second*, that the devices covered by the reissued patent were in public use, with the knowledge or consent of the patentee, for more than two years prior to his application for this patent, and also that they were publicly known and used by others for more than that time; *third*, that the improvements in question are anticipated by the older art; and, *fourth*, that the defendants do not infringe.

The patent in question has reference to what are known as wire-tooth horse hay rakes, and the claims of the patent alleged to be infringed by the defendants are the second and fourth of reissue No. 2,994, which are as follows:

"*Second*. The combination and relative arrangement of the hinged rake-head with the supporting axle and carrying wheels, substantially as shown and described, whereby the head is supported above the rear upper edge of the axle, as shown, and the lower ends of the teeth, when gathering the hay, occupy positions in rear of the tread of the wheels, and forward of a vertical plane on a line with the rear edge of the wheels, substantially as shown in the accompanying drawings.

"*Fourth*. The arrangement of the rake-head, E, and foot-treadles, H J and G K, or either, in relation to each other and the axle, B, substantially as and for the purposes set forth."

In his specifications, forming part of the original patent, the patentee inserted a disclaimer as follows:

"I do not claim the wire teeth, F, attached to the head, E, as shown, for such device, mounted on wheels, is in quite common use."

This disclaimer is wholly omitted from the reissued patent, and the only claim in the original patent was:

"The arrangement of the treadle, J K, lever, I, rake-head, E, arms, G K, bar, F, joint, C, and adjustable rope, L, substantially as and for the purposes set forth."

This patent was before the United States circuit court of Massachusetts in June, 1872, in the case of *Brown v. Whittemore*, 5 Fish. 524, Mr. Justice Clifford and Judge Lowell, presiding, and the two

claims now in question were sustained under the facts in that case, and it was again before the same court, Judge Lowell, presiding, in December, 1879, in the case of *Edgarton v. Beck*, and the fourth claim sustained under the facts in that case. In the first of these cases the court said:

"The record does not contain a copy of the original patent, and there is no evidence of what changes, if any, are found in the reissue. In the absence of such evidence we must, of course, assume that the action of the patent-office was well warranted by the facts, and that the reissued patent is open to only such objections as might have been raised to the original patent."

In *Brown v. Whittemore* the second point made in this case seems to have been urged, and the court said:

"Upon a very careful examination of the evidence we are of opinion that the combinations of the second and fourth claims were not only invented by Whitcomb, but that they had not been publicly used or sold with his consent before the time in question. \* \* \* And, though the evidence is not all on one side, yet the preponderance of it is that the combination of the treadle for raising the rake-head with the other devices was not fully discovered and used before June, 1856."

In *Edgarton v. Beck* the contest seems to have been mainly over the questions of novelty and infringement.

But the proofs in *Brown v. Whittemore*, on the question of prior use and sale with the consent of the patentee, and in *Edgarton v. Beck*, on the question of novelty, do not seem to have been the same as in the cases now before the court; and the original patent is before this court, which was not before the court in the *Whittemore Case*.

Of course, if the testimony in these cases was substantially the same as that in the cases heretofore decided by the learned judges in the Massachusetts circuit court, I should feel wholly bound by their decisions and the construction of the patent given by them. But, as it is evident from the inspection of this record that I have a different combination of facts to deal with from what has been heretofore presented, I must consider these cases in the light of their own evidence.

The first objection to the second claim is that it comes within the disclaimer of the original patent.

"I do not claim the wire teeth, F, attached to the head, E, as shown, for such a device, mounted on wheels, is in quite common use."

What is it that Whitcomb here disclaims? My own construction is that it is the rake-head, E, mounted on wheels, as described in his specification and shown in his drawing; and this rake-head and mode of mounting it is described in his original specifications in the following language:

"The back end of the shafts or thills, C C, extend a trifle back of the axle, B, and to the back end of the thills, beyond the back part of the axle, a rake-head, E, is connected by joints or hinges, C, the hinges being at the under side of the rake-head, as shown clearly in figure 1, so that the head may work thereon as a fulcrum."

Figure 1, in the drawing of the original patent and in the reissued patent, shows the rake-head made of a square stick of timber, with an eye-bolt passing through from corner to corner, which, with an eye-bolt or staple passing through the end of the thill, makes the joint or hinge by which the rake-head is attached to the carriage. By this arrangement the teeth hang nearly in a line with the periphery of the wheel, the points coming to the ground just back of the tread of the wheel.

Naturally enough the curved rake teeth will hang or move somewhat in the line of the periphery of the wheel, and they will hang just back of the tread of the wheel.

If I am right in my construction of this disclaimer, there can be no doubt that the second claim of the reissue is for the very thing which Whitcomb disclaimed and said was in common use in his original specification. He brings this case clearly within the principle laid down by the supreme court of the United States in *Leggett v. Avery*, 101 U. S. 259:

"We think it was a manifest error of the commissioner in the reissue to allow the patentee a claim for an invention different from that which was described in the surrendered letters, and which he had thus expressly disclaimed. The pretence that an error had arisen by inadvertence, accident, or mistake, within the meaning of the patent law, was too bald for consideration. The very question of the validity of these claims had just been considered and decided with the acquiescence and the express disclaimer of the patentee. If in any case, where an applicant for letters patent, in order to obtain the issue thereof, disclaims a particular invention or acquiesces in the rejection of a claim thereto, a reissue containing such claim is valid, (which we greatly doubt,) it certainly cannot be sustained in this case."

Then, again, they say, on the same page:

"As before remarked, we consider it extremely doubtful whether reissued letters can be sustained in any case where they contain claims that have once been formally disclaimed by the patentee, or rejected with his acquiescence, and he has consented to such rejection in order to obtain his letters patent. Under such circumstances, the rejection of the claim can in no just sense be regarded as a matter of inadvertence or mistake. Even though it was such, the applicant should seem to be estopped from setting it up as an application for a reissue."

So, too, in the bottle-stopper case, lately before Judge Shipman, (*Putnam v. Tinkham*, 4 FED. REP. 411,) the learned judge says:

"The claim is as follows: 'The internally located bottle stopper, B, provided with a hinged or jointed handle or bail, C, composed of two elastic legs or branches, and an eye or finger loop, as and for the purpose set forth.' He virtually disclaims rigid handles, and says that his invention is designed to avoid such a method of construction. It is useless to say that by a rigid handle he merely meant a bail without spring action, for the entire paragraph shows that he also meant a handle so jointed or hinged to the stopper that it could be turned away from the mouth of the bottle. He intended to point out that his handle or bail was both hinged to the stopper and had elastic legs. The reissue covers a device in which the bail is attached to the stopper in any manner. The hinged construction is briefly alluded to as one which accomplishes a certain result. \* \* \* In the original patent the patentee informed the public, with precision, and after deliberation, that his invention was an improvement upon a rigid handle, and limited himself to a hinged or jointed handle. It has now become important for the plaintiff to possess himself of the territory which his assignor attempted to occupy, but abandoned, and the ownership of which he virtually disclaimed. A comparison of the two patents shows that the case is clearly within the principles which have been recently and frequently announced by the supreme court as applicable to reissues. The reissue is void because it is on its face for a different invention from that which was embraced in the original patent. *Russell v. Dodge*, 93 U. S. 460; *Ry. Co. v. Sayles*, 97 U. S. 554; *Powder Co. v. Powder Works*, 98 U. S. 126; *Leggett v. Avery*, 17 O. G. 445."

These authorities seem to fully meet this case, and I can put no other construction upon them than that this claim is void by reason of the original disclaimer. This patentee had no right, after having stated positively to the world and to the patent-office that he did not claim the idea of mounting the rake-head upon the top of the carriage, by a reissue, to claim this as an element of invention by himself. But if there is room for doubt as to the soundness of this position, I am also clear that the defendant does not infringe this claim. The claim is for the combination, etc., whereby the head is supported above the rear upper edge of the axle, as shown. The defendant's rake-head is suspended behind or in the rear of the axle by brackets, hung, so to speak, behind the axle, instead of being supported above the axle.

In *Edgerton v. Breck* Judge Lowell says:

"The difficulty with the second claim of the reissue, as applied to this case, is that the patentee has seen fit, for some reason, to describe his rake-head as supported above the upper edge of the axle, and the defendant's rake-head is on a line with the axle. It may be that this limitation is unnecessary, but it is found in the second claim, and I do not feel at liberty to disregard it."

The inspection of the two models before me shows that the distinction taken by Judge Lowell was mechanically and technically correct. The specification and drawing described the particular manner and place where and how the patentee, Whitcomb, supported his rake-head upon the carriage. Judge Lowell sees fit to confine him to that special method of so supporting his rake-head. The defendant does not literally support his rake-head upon the axle at all, but by means of the brackets he suspends or hangs it in the rear of the axle, so that a different function or mode of operation is accomplished by defendant's rake-head from what is accomplished by the Whitcomb rake-head. The Whitcomb rake-head, having for its point of motion the place of attachment to the thills by its hinge, necessarily made it more difficult to keep the teeth upon or near the ground while gathering the load, while by the peculiar manner in which defendant's rake-head is suspended, its whole weight aids in holding it down in working position.

Probably the testimony before Judge Lowell, in this case, showed that Whitcomb must, from the state of the art, be confined to the specific device—that is, the special place where, and mode by which, he supported his rake-head on the carrying wheels; because the proof in this case shows that Randal Pratt had mounted his rake-head over or on the axle long before Whitcomb entered the field, and that Whitcomb himself, and Banks and Craft, had, as early as 1853, 1854, and 1855, made rake-heads with the heads mounted on or over the axle and behind the axle.

Randal Pratt, in his patent granted in 1856, says:

“Over the main axle, and secured to it by studs or posts, is a rod or axle marked *c c*, extending the whole length between the wheels, to which the teeth of the rake are attached, by any form of movable joint, so that each may move up and down independent of the rest. This rod also forms the center of motion of the apparatus for raising and depressing the teeth, to be hereafter described.”

An inspection of Pratt's patent shows his rake-head supported over the axle in substantially the same way; not, of course, attached by just the same kind of joint or hinge, but mounted over the axle so that the teeth fall outward and backward almost in the line of the wheels, and come to the ground just back of the tread of the wheels. That is, there may be, in the practical full-sized rakes, a few inches difference, but not enough to make a distinction or difference in the principle or mode of operation of the two devices in that regard.

The same principle and mode of operation, but differently worked

out, are found in Delano's patent of 1849, Martz's patent of February, 1856, and in Grant's English patent of 1847.

As to the fourth claim it is urged by the defendants that this claim is void for uncertainty, because it does not describe an operative mechanism. It is for the "arrangement of the rake-head, E, and foot treadles, H J and G K, or either, in relation to each other, and the axle, B, substantially as and for the purposes set forth."

This claim does not connect the treadles with the rake-head nor the axle, nor show how these treadles are operative parts of the machine. The description of these in the reissued patent is as follows:

"To the upper end of bar or arm, F, are hinged or pivoted the rear ends of the arms, G and H. The front end of arm, G, is pivoted or hinged to the hand-lever, I, which in this instance is slotted out to receive the lever, G, as shown at *d*, while its lower end is hinged or pivoted to the front ends of the braces, *a<sup>1</sup> a<sup>1</sup>*, as shown at *e*. The lower end of arm, H, is hinged or pivoted to the rear and lower end of the foot-treadle, J, the front end of which treadle, J, being hinged or pivoted to the angle-braces, *a<sup>1</sup> a<sup>1</sup>*, as shown at *f*. Another foot-treadle, K, is hinged or pivoted to the angle-braces, *a<sup>1</sup> a<sup>1</sup>*, as shown at *g*, and the rear inner part of the foot-treadle, K, is connected to the front part or end of arm, G, by a link or rod, *h*."

Here is a description of two separate treadles operating independently of each other. Their functions are different, and no part of one forms any part of another. The words "or either" would seem to indicate that it was the purpose of this patentee to claim that if any person used both or one of these treadles he thereby infringed upon this claim,—that is, if a rake is made with the treadle, H J, for the purpose of unloading the rake, and an entirely different device from the treadle, G K, for holding the rake teeth down while gathering the hay, this claim is thereby infringed; that is to say, the true construction of this claim contended for by complainants is that the words "or either" cover the use of either of these treadles for the purpose of performing the function they respectively fulfil in complainants' rake. If this is the construction of this claim, then the words "in relation to each other" must be disregarded, as these are words which show combination, or a joint or common function, in the parts described. I think that you must reject the words "in relation to each other," as applicable to these treadles, or else the two treadles are to be treated as independent organisms, each one of which is covered by this claim.

It seems to me that, as a combination of parts, this claim must be held void for uncertainty, as I have already said, because it does not show whether the patentee intended to cover by this claim the two

treadles working in combination with each other for their different purposes, or whether he intended to cover each one as a separate device, so as to be able to punish any infringer who used both or only one. In other words, it seems to me he attempts here to cover not only the combination of these treadles with the axle, but each separate element of his combination; and this, I think, cannot be allowed. But even if I am wrong in this construction, still it seems to me that this claim must be held inoperative, because it shows no useful result which can be produced by this mechanism alone. He does not show that these treadles are to operate in combination with the bar or standard, F<sup>1</sup>, so as to work the rake-head either to unload or hold it down while gathering the hay.

As claimed, these treadles are simply two sticks, as was said upon the argument, which are not connected with any part of the mechanism. It is true that the words "as shown" refer us to the specifications and drawings of the patent; but when we examine these specifications and drawings, we find that these treadles do not reach any operative combination or connection with the axle except through the rake-head, and it is so obvious that it needs no argument, that the treadles and axle alone would not rake hay or perform any other effective work; so that a claim of the treadles and axle gives us no operative mechanism. But without being hypercritical as to the language of this, or either of these claims, I find from the proof that both these treadles were used and sold with Whitcomb's consent more than two years before the patent was applied for. These treadles are both shown in the three full-sized rakes in evidence in this case. These rakes were, I am satisfied, made and sold as early as 1855. The only substantial difference between these rakes and the patent is the mode of hinging the rake-head to the axle or carriage. In the full-sized rakes shown in evidence the rake-head is fastened to the carriage by clasps, which allow the rake-head to revolve within the clasps upon its own axis. This rake-head is attached to the carriage frame by the joint, C, so that the lower corner of the rake-head is made the center of motion,—a difference which may have some mechanical value, but is only a specific difference.

These treadles which I am now considering were in use in the old rakes in 1854 and 1855. This evidence shows that Whitcomb began to make rakes as early or earlier than 1851. In 1852 he applied for a patent on the form of rake which he then claimed to have invented, which application was rejected. In this application he shows a horse rake with wire teeth, and the teeth attached directly to the

axle of the carriage and operated by a mechanism something like a reach, as it was called, or the bar, H, and the lever, I. In 1853 he adopted a separate rake-head, which, of course, he or some one mounted on or attached to the carriage. This separate rake-head, in order to be operative or of any use to the mechanism, must be in some way attached to the carriage. Some mode of unloading was also necessary to the operation of this machine. As all these rakes were intended to allow the driver to ride, some kind of treadle or lever, operated by the feet as well as the hands, was almost a necessity, and was indispensable to the practical operation of this rake by one man. The whole organism shows that it was intended that the driver should ride upon the carriage, and that he should operate the rake from his position on the driver's seat. There must, therefore, be embodied in the mechanism, in some form, levers and treadles which would enable the driver to operate the rake, to hold the teeth down while gathering the hay, and raise the rake-head when loaded.

I therefore come to the conclusion that treadles and levers were early adopted in the progress of the developement of this rake, and that, substantially, the treadles which are shown in the Whitcomb patent were in use for much more than two years prior to the application for this patent.

The testimony on the part of the defendants shows clearly, as evidenced by the recollection of witnesses, that such treadles were used; but from the very nature of the invention, and its progress, step by step, it seems to me that one of the most natural devices that the mind of the constructor would be directed to in making a practical riding hay rake, would be the method of operating the rake from the driver's seat, and they could hardly have attempted to make a device for that purpose without the adoption of treadles. This view seems also to be so fully in harmony with the recollection of the witnesses who have testified as to the development of the finally perfected rake, that I consider it confirmatory of the testimony of those witnesses.

Whitcomb first began to make rakes at Glenville, Connecticut. He moved to Brundage's Corners, which were only a couple of miles from Glenville, in 1853, and there had his factory until the fall of 1855, when he moved to Port Chester; these places being all within a very few miles of each other. This locality seems to have been one in which the manufacture of this class of horse rakes had its first inception. A number of persons besides Whitcomb were engaged in the same line of manufacture. It is true that they may have followed Whitcomb. He may have been the inventor of the rake-head, E, as



shown in his patent, and he may have been the first person to support it upon a carriage. He may have been the inventor of the treadles in question.

The only question is, did he apply for a patent before these parts of his rake became common property? and my conclusion from the proof is that Whitcomb did not make his application for a patent until more than two years after this rake-head and these treadles had come into public use with his consent. The full-sized rakes that are put in evidence in this case show satisfactorily that these devices, these treadles and levers, were adopted and in use, and were part of these original rakes, at the time they were made and put upon the market, and that they were actually made and sold as early as the haying season of 1854.

This certainly fully sustains the conclusion to which I have arrived as to the use of these treadles in those rakes. It is claimed on the part of the complainants that the old rakes have been altered over; that new treadles have been put into them; but there is nothing in the appearance of the mechanisms or of the treadles, as they stand now before the court, to show that there has been any change. All the parts seem to be of an age—they all bear the same marks of exposure. There is no evidence of any cutting, or change by substituting the treadles they now have for other devices. Indeed, the whole appearance of these old rakes satisfies me that they now show their parts as they were originally constructed.

I have therefore come finally and firmly to the conclusion that these treadles were old and common property at the time this patent was issued. Perhaps, as I have already said, they were Mr. Whitcomb's invention. He seems to have been the leading genius in that locality in reference to this class of farming implements, and it is likely and probable that these improvements were his. But he abandoned them to the public. He allowed his neighbors to use them. They were public property, and sold on the market long before the expiration of two years prior to the application for this patent, and they were not mere experimental uses. These rakes were made and sold in the market for use in the fields, not merely for the purpose of seeing whether they would work or not.

So that, from all these considerations, I come to the conclusion that the claims of this patent involved in this suit must be held to be void, and this bill must be dismissed for want of equity.

**MAXHEIMER v. MEYER and another.**

(Circuit Court, S. D. New York. October 5, 1881.)

**1. LETTERS PATENT—JOINDER OF INVENTIONS.**

The joinder of separate inventions for the accomplishment of a single result in the same patent does not thereby invalidate it.

**2. SAME—BIRD CAGES.**

Letters patent Nos. 162,400 and 218,758, granted April 20, 1875, and August 19, 1879, for improvements in bird cages, the result being a cage in which the cross-bands are hollow wires with holes, through which the upright wires are placed, and which are held in place on the upright wires by short bends in the latter, which are brought within the bands, which are then flattened, are infringed by a cage of similar construction, except that the bends extend in the direction of the axis of the bands, instead of radially.

In Equity.

*Arthur v. Briesen*, for complainant.

*J. Van Santvoord*, for defendants.

**WHEELER, D. J.** This suit rests upon two patents granted to the orator for improvements in bird cages,—the first, numbered 162,400, dated April 20, 1875, for a cage in which the horizontal bands are solid wires, with holes, through which the upright wires are placed, and which are held in place on the upright wires by short bends in the latter, forming shoulders above and below the horizontal wires, without solder or other fastening; the second, numbered 218,758, dated August 19, 1879, after an interference between him and Michael Grebner, who prosecuted it at the instance and expense of the defendants, is for a cage in which the horizontal bands are hollow wires, through which the vertical wires pass, with short bends in them within the hollow of the horizontal wire, which is flattened so as to lock them together. The defendants deny the novelty of the second patent, and infringement of either. The plaintiff insists that they are concluded as to the novelty of the second patent by the decision in his favor against them in the interference proceedings. The defendants make and sell cages having vertical wires with bends in the hollow of horizontal bands, locked by flattening the latter, like the plaintiff's, except that the bends extend in the direction of the axis of the bands, instead of radially, whereby the band can be flattened more perfectly.

It does not appear from any of the evidence that any cages had ever been constructed before the plaintiff's invention described in his first patent, in which the upright wires and cross-band had been held together by their own conformation, without the aid of solder or some

contrivance to tie or lock them together. That invention and patent, therefore, underlie all constructions of cages where the horizontal bands are held in place solely by shoulders formed on the upright wires. The plaintiff's second patent is for an improvement upon his first, by bringing the bends within a hollow cross-band, and making the connection more firm by flattening the cross-band and bringing the shoulders formed by the holes through it more closely to the shoulders on the vertical wires. The cross-bands are held in place solely by the shoulders on the upright wires in both, the improvement in the latter consisting merely in the better mode of bringing the shoulders to bear.

In the defendant's cage the cross-bands are held in place solely by these means, and the shoulders are brought to bear by the plaintiff's improved method. They therefore infringe both patents, if the second is valid. The only near approach to the plaintiff's invention sought to be patented in this patent, and the only one to which special reference is deemed to be necessary prior thereto, is in some cages made by John L. Fisher, inventor and assignor in letters patent No. 167,325, dated August 31, 1875, for an improvement in bird cages, in 1876, at Buffalo. This patent is for a cage with a hollow cross-band, like the plaintiff's, with short bends on the upright wires, within the hollow of the cross-band, but held in place by a wire key inserted within the bends and through the wire, and locking the upright wires to the cross-band. This is not the plaintiff's invention, which does away with all contrivances for fastening except the shape of the cross-band and upright wires.

The evidence shows clearly that Fisher made some cages before the plaintiff's invention without this wire key. Those so made, without other fitting than the insertion of the upright wires with their bends through the holes in the cross-band, would not have a firm attachment of the cross-band to the wires. It is said in behalf of the plaintiff that none of these had all the cross-bands without the key; but this is not material, for one cross-band and its connection with the wires would show the invention as well as more. The evidence tends to show that in shaping some of these cages the cross-bands out of which the key had been left were flattened, and a firm connection thereby made between them and the upright wires. That, if done, would show the construction of the plaintiff's second patent. But it is doubtful whether that was done. If done, it was not for the purpose of making a better connection between the bands and wires, nor known then to have that effect, but was accidental, and inci-

dental to the process of shaping the cages. Neither does this effect appear to have been observed before the date of the plaintiff's invention, if it existed. This would not show that Fisher, or those who saw his work, invented, or had prior knowledge of, this thing patented by the plaintiff, before he invented it. Rev. St. § 4920; *Andrews v. Carman*, 13 Blatchf. 307.

These conclusions make it unnecessary to consider the effect of the decision in the interference proceedings, even as to the invention of Grebner, set up in his application which set on foot these proceedings. The defendants' mode of placing the bends in the upright wires lengthwise in the hollow of the cross-band may be an improvement upon the plaintiff's mode, but, if it is, in employing that improvement they make use of the plaintiff's patented invention without right, although that improvement is patented.

The plaintiff's second patent also contains a claim for a feed cup, in connection with the vertical wires of the cage, and it is insisted for the defendants that this invention is independent of the other, and that the patent for both is therefore void. But these inventions are connected together by being appropriate for use in the same cage for the common purpose of making a bird cage, and under these circumstances the joinder of both in one patent does not render the patent void. *Emerson v. Hogg*, 2 Blatchf. 1; *Hogg v. Emerson*, 6 How. 437.

Let a decree be entered for an injunction and an account according to the prayer of the bill, with costs.

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**AVERILL CHEMICAL PAINT CO. v. NATIONAL MIXED PAINT CO.  
and others.**

(*Circuit Court, S. D. New York. October 29, 1881.*)

**I. LETTERS PATENT—PAINTS—VOID REISSUES.**

Reissues are void if broader than the original patent.

Hence, reissued letters patent No. 7,031, dated April 4, 1876, and granted to Damon R. Averill, assignee, for an improvement in paints, the claim being for a mixed liquid paint composed of certain ingredients, "put up in tight vessels or cans," is broader than the original patent, which made no claim to anything to contain the paint, and void.

**In Equity.**

*John R. Bennett and George Harding*, for plaintiff.

*Edmund Wetmore*, for defendants.

WHEELER, D. J. This suit is founded upon reissued letters patent No. 7,031, dated April 4, 1876, granted to Damon R. Averill, assignor, for an improvement in paints. The claim is for "a mixed liquid paint composed of oxide of zinc or other pigments, oil, turpentine, or benzine, water, and one or more emulsating agents, put up in tight vessels or cans." The original patent was No. 66,773, dated July 16, 1867, for an improved paint compound, particularly described by ingredients and quantities like that in the reissue, but with lime-water and silicate of soda, which were emulsating agents, but not stated to be such, specified as parts of the combination and compound. The claim was for "a paint composed of the ingredients herein named; and prepared and compounded substantially in the manner specified." There was no allusion in the patent to anything to contain the paint. Liquid mixed paints, produced by the use of emulsating agents, were known and used before Averill's discovery, and paints had been contained in cans and other tight vessels before that time, but no paint had been made by the use of his precise combination and ingredients before. On the application for a reissue the patentee made proof that, prior to his application for the original patent, he had put up his paint in cans and other tight packages, and noticed its advantages for being put up in that way, which appears to have been satisfactory to the commissioner that this mode of packing was a part of the original invention, and upon that proof the reissue appears to have been granted. The defendants do not use the combination or compound described in the original patent. The principle defences are that the reissue is not supported by the original, and is therefore void; that the patentee was not the original and first inventor of the invention described in the reissue; and that if the reissue can be upheld at all, the defendants do not infringe any part for which it is valid. The original patent was valid enough, apparently, for the particular kind of paint described in it. The reissue, if it is for that kind of paint only, packed in tight vessels, may be valid, for it would merely narrow the scope of the claim upon the same invention from that kind of paint everywhere to that kind of paint only when so packed. But the reissue is not limited to that particular kind of paint. It extends to all forms made from the same ingredients, other than the emulsating agents specified, by the use of any emulsating agents. This expands the original patent, not only beyond the scope of the claim upon the invention described, but beyond the scope of that invention. The whole invention there described was of a particular kind of liquid mixed paint. The invention described in the

reissue is of all kinds of liquid mixed paint packed in tight vessels. The invention of packing in vessels is not at all described, or even alluded to, in the original patent. So the question is presented whether the commissioner of patents is authorized to grant a reissue of a patent for an invention, in addition to that shown in the original, upon proof, in the absence of any drawing or model showing the invention in the original, that the addition was really a part of the same invention sought to be patented in the original. This question does not now seem to be open.

In *Powder Co. v. Powder Works*, 98 U. S. 126, the patents were for compositions or articles of manufacture like that here. That part of section 53 of the act of 1870, now section 4916 of the Revised Statutes, authorizing amendment of patents upon proof, in the absence of any drawing or model, was relied upon and came under consideration. It was there held that this clause did not authorize the commissioner to grant a reissue for a different invention; or to determine that one invention was the same as another or different one; or that two inventions essentially distinct constituted but one. The question was left open as to whether that clause related to all patents, or only to patents for machines, but no room was left for adding to the invention by proof. Under that decision this reissue cannot stand. If it could stand, the only invention covered by it of which Averill was the first discoverer would be packing this paint in tight vessels. Such vessels impart no quality to the paint. They are no more useful to this kind of paint than to others, in proportion to the amount used. The paint, on account of its valuable qualities, has found its way into extensive use through the ordinary vehicles for paints, and Averill has doubtless contributed largely to its success, but it has been done by business enterprise rather than patentable invention. What he is really the first inventor of the defendants have not taken.

Let there be a decree dismissing the bill of complaint, with costs.

## AMERICAN BALLAST LOG CO. OF NEW YORK v. BARNES &amp; GATTO.

(Circuit Court, D. Maryland. December 3, 1881.)

## 1. LETTERS PATENT—FLOATING BALLAST FOR VESSELS IN PORT.

Letters patent No. 126,938, issued May 21, 1872, to Demartini & Chertizza, for improved method of ballasting vessels in port by means of floating logs, to be attached to each side of the vessel, *held*, not infringed by the use of the device for which letters patent No. 232,435 were issued September 21, 1880, to Barnes & Gatto, consisting of a pontoon with two compartments affixed to one side of the vessel only.

## In Equity.

*Sebastian Brown and I. Nevitte Steele*, for complainant.

*W. Pinkney Whyte and John H. Barnes*, for defendants.

Before BOND and MORRIS, JJ.

BY THE COURT. This bill of complaint is filed for an alleged infringement of patent No. 126,938, granted May 21, 1872, to Demartini & Chertizza, for improvement in methods of ballasting vessels in port, which has been assigned to the complainant. The patentees' specifications state that—

"Under the [then] present practice, when a vessel arrives in port and discharges her cargo, ballast must be immediately taken in to prevent careening and consequent injury to herself and other craft, as well as to facilitate repairs and other operations incident to preparation for a new voyage. To avoid the loss of time and expense attending this course, we employ ballast logs, connected with the vessel by ropes or chains, that lie along-side thereof, and yet float in the water, as hereinafter described."

The specification then describes the logs as simple pieces of timber, or several smaller sticks bolted to each other, made proportioned to the size and weight of the vessel, and, if necessary, weighted with lead or iron.

"The logs are in all cases designed to float or be self-sustaining in the water, and thus made capable of being towed from place to place or vessel to vessel. They are attached to a vessel by ropes or chains, fastened to the logs and passing over the deck, or around any suitable part of the frame-work, or otherwise secured, as found practicable or convenient. The logs are not intended to hold the vessel down in the water, but merely to act as counter or balance weights when she attempts to keel over from any cause, either when being towed or lying along-side a wharf; and it is evident the chains on one side will be taut only when those on the other are slack, and *vice versa*,—the tendency being to raise the log upon the rising side out of the water. The weight of the log will always prevent this being done, and consequently the vessel will be held in an upright position."

The claim is "the method of ballasting vessels by means of floating logs, of suitable size, weight, and construction, attached to said vessels by ropes and chains, and arranged along-side thereof, substantially as specified." The device described in this patent has been introduced by the complainant into very general use in the ports of Boston, New York, Philadelphia, and Baltimore, among vessels requiring ballast to keep them upright in port when empty, and particularly among grain vessels, which are required to be completely emptied and ceiled before receiving cargo. The defendants, in their answer, deny that the device used by them is an infringement, and also charge that the complainant's patent is invalid by reason of long prior knowledge and public use. The device used by the defendants is one for which a patent has been granted to them, No. 232,435, dated September 21, 1880, for harbor ballast for ships. It is also to be attached to the outside of the ship, but on one side only. It consists of a floating water-tight box or pontoon, divided into a lower and an upper compartment. The lower compartment is filled with water, and the upper one is air-tight and empty. It is attached to one side of the ship by means of chains or ropes,—one fastened to the ship's deck, and the other carried under her keel and up the other side. If the ship careens away from the side on which it is attached, the weight of the box and of the water contained in the lower compartment pulls the ship back to an upright position. If the ship careens towards the side on which it is attached, the buoyant power of the empty air-tight compartment is sufficient to check the tendency of the ship to overturn towards that side.

The conclusion to which we have arrived is that there is no infringement. The device of the complainant is a combination of two counter-balance weights. That the weights float in the water is only an incident of their usefulness, and has nothing to do with the essential principle of their action. As stated in the specifications of the patent, it is only the resistance of the weight of the log when the vessel, in keeling over, attempts to lift it from the water which produces the result intended. It is the two counter-balancing weights which the inventor relied upon, and one without the other would be useless.

The defendants' device makes use of but one weight, and the counter-balance is produced by the buoyant power of the air-tight chamber of the pontoon. This is made efficient by having the pontoon, not loosely floating by the side of the ship, as is the case with the ballast logs, but so secured to the ship that it cannot remain floating



in the water when the ship careens towards it, but is carried down and submerged until its buoyant power checks the ship and returns her to an upright position. This, it seems to us, is a different invention from that described and claimed in complainant's patent. It may have been the result of a study of the complainants' device, stimulated by its success, but the defendants have rejected one of the essential elements of complainant's combination, and substituted in its place a new mode of accomplishing the same object, which, in our judgment, is not a mechanical equivalent, and is not similar in principle or operation. The buoyancy of the air chamber on one side of the ship does not perform the same function as was performed by the weight which is dispensed with on the other side. The function of the weight was to drag down the side of the ship by which it was being lifted from the water. The function of the air chamber is to resist the tendency of the ship in careening to bury it under the water. The quality of buoyancy is not called into action at all in complainant's device. It is useful to that device only so far as it renders the logs easy of transportation to the ship, and so far as it renders the logs inactive when the vessel is in an upright position. Its use in any other way, or for any other purpose, is not suggested in complainant's specifications or claim.

Complainant's patent cannot be construed to cover all methods by which vessels may be kept upright in port by means of contrivances fastened on the outside and floating in the water, but only such as are substantially identical with the device described in the patent, in construction, form, and principle of operation. *Case v. Brown*, 2 Wall. 320.

Being clearly of opinion that the charge of infringement is not sustained, and that there can be no decree in favor of the complainant, it is not necessary for us to consider the defence of want of novelty set up by the answer.

Bill dismissed.

## THE FERRERI.

(District Court, E. D. New York. November 19, 1881.)

## 1. CONVERSION—JURISDICTION OF THE DISTRICT COURT.

Where goods, that had been sold to be paid for on delivery, were shipped in the name of the vendors, a shipping receipt given to them, and a bill of lading subsequently given to the vendee, who then absconded, *held*, that upon the refusal of the master to give the vendors a bill of lading, they could recover against the vessel the value of the goods without a demand; and that, as the vessel was in navigable waters, the tort was maritime in its character, for which an action could be brought in the district court.

*W. W. Goodrich*, for libellants.

*L. Ulo*, for claimant.

**BENEDICT, D. J.** The facts in this case are as follows:

In September last one Theodore Michel agreed, through a broker, to purchase of the libellants 167 barrels of resin, the resin to be shipped on the bark Ferreri in the name of the libellants, they to take the ship's receipt and deliver the same to Michel upon his paying for the goods. Accordingly, the libellants directed Johnson & Hammond, the keepers of a yard where the libellants had resin stored, to deliver 167 barrels of resin to the bark Ferreri on their account. Johnson & Hammond sent the goods to the bark, where they were received by the mate, who gave in return a shipping receipt stating the receipt of the goods in question in good order from Johnson & Hammond on board the bark Ferreri for account of Tolar & Hart. After the goods had thus been placed on board the bark, Michel, who was agent for the bark in this port, procured the master to issue to him, as shipper, a bill of lading for the goods so delivered, and then absconded without paying the libellants for them, although payment had been demanded, accompanied by a tender of the shipping receipt. After the departure of Michel, Tolar & Hart demanded of the master that he issue to them a bill of lading for the goods in question, accompanying the same with a tender of the shipping receipt. The master refused, upon the ground that he had already issued a bill of lading for the goods to Michel, whereupon Tolar & Hart libelled the vessel.

Upon these facts it is plain to be seen that Tolar & Hart had no intention to part with their goods until the same were paid for. This intention they carried into effect by causing the goods to be placed on board the vessel in their name, and by taking the shipping receipt for the goods as received by the vessel on their account. The delivery of such a receipt to Tolar & Hart bound the ship-master to execute or withhold the bill of lading according to their direction, and left the title to the property unchanged. *Brown v. Peabody*, 3 Kern. 121. When, therefore, after Michel had absconded, the master refused to issue a bill of lading for the goods to Tolar & Hart, assign-

ing no other reason except that he had already given a bill of lading to Michel, he was guilty of converting the property. A formal demand for the return of the property would have been a vain act after the master had refused to give a bill of lading to the libellants, placing his refusal of the libellants' demand for a bill of lading upon the ground that he had already given a bill of lading for the goods to Michel. Such a refusal was equivalent to saying: "I have determined to transport this resin to Marseilles, and there deliver it to the holder of the bill of lading already issued to Michel." Such a refusal rendered a subsequent demand of the goods unnecessary.

Tolar & Hart, upon the master refusing under these circumstances to give them a bill of lading, could waive any right depending upon an implied contract on the part of the master to give them a bill of lading for their goods, then on board his vessel, and proceed for the tort. This right they can enforce in the admiralty. The goods were on board a vessel for the purpose of shipment. The locality was navigable water. The tort, therefore, was maritime in character, and within the jurisdiction of the admiralty. For such a tort the ship herself is bound. The goods were actually on board the vessel. The tortious act was that of the master of the vessel. In cases of affreightment the goods are bound to the vessel and the vessel to the goods. This vessel is, therefore, bound to these goods, and liable to the owners thereof for their loss, destruction, or conversion by the act or the neglect of the master of the ship.

I entertain no doubt, therefore, as to the right of the libellants to maintain an action *in rem* against this vessel to recover the value of the resin in question. The difficulty with the case, if any there be, arises out of the method of framing the libel. The averments of the libel are these:

That the libellants sold the resin to Michel to be delivered to the bark for the sum of \$553.96, to be paid on delivery of the goods to the vessel and the production of the usual shipping receipt therefor; that the resin was delivered to said vessel and a shipping receipt therefor given to the libellants by the master; that by the custom of the port no bill of lading shall be made or delivered by the master except upon the surrender of the shipping receipt; that the master has given a bill of lading to Michel without a surrender of the receipt, and refused to give a bill of lading to the libellants; that the vessel is about to proceed to a foreign land, and if she be allowed to depart without giving the libellants a bill of lading and procuring the surrender of the bill of lading given to Michel, or giving indemnity against damage, the libellants will be remediless.

The prayer of the libel is as follows:

"Wherefore, the libellants pray that process in due form of law, according to the course and practice of this honorable court in cases of admiralty and maritime jurisdiction, may issue against said vessel, her tackle, apparel, and furniture, and that all persons having any interest therein may be cited to appear and answer all and singular the matters aforesaid; that they may be compelled to issue a bill of lading for said goods to these libellants and procure a surrender of the bill of lading given to said Michel, and may indemnify the libellants against all loss and damage by reason of the issuing of said bill of lading to said Michel; and that the said vessel may be condemned and sold, and the libellants paid any damages they may sustain in the premises, with interest and costs, and may have such other and further relief as to law and justice appertain.

No exception has been taken to the libel on the ground of inconsistency in the relief prayed for, and under such a libel it is open to the libellants to take any decree warranted by the facts that may be within the scope of his prayer. But it is said by the claimant the libel proceeds upon the theory of a right in the libellants to have a bill of lading of the goods, and therefore the action is simply an action for specific performance. The libel, however, contains facts sufficient to sustain a decree for conversion, and the prayer is, among other things, that the vessel be condemned and sold to pay any damages sustained by the libellants by reason of the premises. I am unable, therefore, to hold that the only right set up in the libel is the right to have a bill of lading.

Again, it is said, in behalf of the claimant, if the action be treated as an action for damages, the damages claimed are those arising from the failure to receive a bill of lading, and not damages for converting the resin. But, as already pointed out, the facts set forth make a case of conversion, and the general prayer is to be paid damages accruing to the libellants out of the premises. It cannot, therefore, be held that the method of framing the libel, objectionable as it certainly is, constitutes, in the absence of any exception, an insurmountable obstacle to treating the action as based upon a maritime tort. It is not seen, therefore, that any legal objection stands in the way of considering this case to be an action to recover damages for the conversion of the property in question, and as, upon the argument, the desire to have it so treated was expressed, that course will be pursued.

This view of the case renders it unnecessary to determine whether a proceeding *in rem* against the ship can be resorted to to compel the

master of the ship to give a bill of lading,—a question upon which something may be said on both sides. Equally unnecessary is it to consider what damages could be recovered by the libellants at this time, the vessel not having performed the voyage, and it being still possible for the vessel to deliver the goods to the real owner at the port of destination, (*The Idaho*, 5 Ben. 280; 93 U. S. 576,) if the case were to be treated as an action to recover the damages arising out of the breach of an implied contract to deliver the bill of lading to the holder of the shipping receipt.

I may, however, make a single remark in regard to the point made, that, under the circumstances of this case, the master was under no obligation to give a bill of lading to the libellants, because no contract to transport the goods was ever made with them, but with Michel.

The fact that a contract to transport this resin was made between the master and Michel, in pursuance of which the bill of lading to Michel was issued, by no means compels the conclusion that the only obligation resting upon the ship arises out of that contract. Such might have been the case if the goods, when shipped, had been the property of Michel; but Michel was neither the owner nor the shipper of the resin in question. This resin was received by the ship from Tolar & Hart, and a receipt given acknowledging the receipt on account of Tolar & Hart. So long as the shipping receipt remained in the possession of Tolar & Hart, the obligation to issue to them a bill of lading rested upon the ship. *Ellershaw v. Magniac*, 6 Exch. 570, note, shows that a shipper of goods shipping for a buyer can, nevertheless, get a bill of lading for himself. *Turner v. Trustees of Liverpool Dock*, 6 Exch. 543, shows that goods may be put on the buyer's ship with nothing said at the time, and nevertheless the seller may get the bill of lading delivered to him. See, also, *Falk v. Fletcher*, 18 C. B. (N. S.) 403; *Kreeft v. Thompson*, L. R. 10 Exch. 282. The last-mentioned case is direct authority for holding, in a case like this, that the master of this vessel could not rightfully refuse to sign the bill of lading which the libellants demanded.

There is still another aspect in which to view this case. By the maritime law, when goods are laden on board a vessel, the master is deemed to contract with the goods. *The Hyperion's Cargo*, 2 Low. 94. That contract enures to the benefit of the owner of the goods. In this case, therefore, it was open to the libellants, when Michel refused to pay for the goods, to claim the benefit of the contract made with the goods when they were put on board, part of which

contract was that a bill of lading should be delivered to the owner of the goods. It would seem, therefore, that upon the master's refusal to give the libellants a bill of lading, they became entitled, either to enforce the delivery of the bill of lading, or to bring their action for the damages caused by such refusal; or, at their option, to waive the contract and sue for a wrongful conversion of the property. But, however this may be, I entertain no doubt of their right to maintain an action for conversion, and in such action recover the value of their goods. That value is shown by the sum they agreed to take from Michel, to-wit, \$553.96, and for that sum a decree will be entered herein.

The record shows that after the seizure of the vessel in this action the claimants procured her discharge from custody by giving a stipulation to perform any decree that might be entered herein, and at the same time depositing in court, subject to the order of the court, a bill of lading, duly executed, such as had been demanded by the libellants and refused by the master. This bill of lading must, of course, be returned to the claimants, and an order to that effect will form part of the decree.

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### MITCHELL v. LANGDON and others.

(District Court, N. D. Illinois. November 26, 1881.)

#### 1. COAL TRADE—USAGES OF THE PORT OF CHICAGO.

The consignee of a cargo of coal is entitled by the usage of the port of Chicago, which this court will recognize, to a full day of 24 hours after the vessel reports, in which to furnish her with a dock and to begin unloading.

In Admiralty.

*W. H. Condon*, for libellant.

*C. E. Kremer*, for respondents.

BLODGETT, D. J., (*orally*.) This is a libel for demurrage in unreasonably delaying the unloading of the schooner Sam Cook in this port. The schooner Sam Cook, with a cargo of 564 tons of coal, consigned to respondents, Langdon, Richardson & Co., arrived in this port Saturday, October 23, 1880, and reported at consignees' dock at 9 o'clock in the morning. Consignees did not commence unloading until the morning of the 25th, and did not conclude unloading until 5 o'clock in the afternoon of the 28th. The proof shows that they could have unloaded the schooner, with the appliances in use on

their dock, in two days, so that she could have been unloaded on the evening of the 26th.

The important question which has been discussed in this case is as to whether there was unreasonable and undue delay in commencing the unloading of this cargo, as well as unreasonable delay afterwards. Much of the proof in the record relates to the usage of this port as to the time within which a vessel arriving here is entitled to be furnished with a dock, and to be unloaded.

The proof in the case shows that by the usage of this port, and especially in regard to vessels loaded with coal,—and the same rule is probably applicable to any other cargo,—a consignee is entitled to 24 hours, or a full day, from the time the vessel reports in which to furnish her with a dock and begin unloading. This seems, in view of the nature of the business, to be generally acquiesced in, and so reasonable that I think the court must hold this is a usage which binds the trade in this port. The time of the arrival of a sailing vessel (even if the consignee is advised of the time of her sailing) being dependent entirely upon the weather, the course of the wind, etc., is always uncertain to the extent of several days, and it cannot be expected that a consignee will keep a force of men all the time ready at once to unload the instant the vessel reports. He must have time to collect his men after the arrival of the vessel, and one day would seem to be only a reasonable time for doing this. He may also have other vessels at the dock in process of loading or unloading, and must have some time in which to dispatch them before accommodating the new arrival.

The evidence in this case shows that the vessel arrived and reported Saturday morning. The consignees were not obliged, by the usage of the port or by the law of the land, to commence unloading her on Sunday. Persons engaged in the unloading of vessels and receiving their cargoes have as good a right to rest on the Sabbath as any other class of laborers and business men, and certainly cannot be compelled to work against the law or their conscience on Sunday, and therefore they were not obliged to begin unloading until Monday morning. They did commence unloading Monday morning, but only unloaded from one hatch at a time. The vessel had two kinds of coal on board, but there was no bulk-head separating them. The consignees, for their own convenience, had the piles of different-sized coal so arranged on their dock that they were obliged, or found it more convenient, to unload only one-sized coal at a time, and when that was out they moved the vessel so as to bring one of the other

hatches opposite the pile corresponding to that left on board, and then unloaded the balance. This mode of unloading was evidently adopted without regard to the interests or rights of the vessel, and solely because it suited the purpose of the consignees. The vessel had the right, under the law and her charter, to quick dispatch, and this was not given her.

My conclusion, then, is that the consignees had the right to take 24 hours, excluding Sunday, in which to furnish a dock and begin unloading, and as the Cook arrived Saturday morning, they were not obliged to begin unloading until Monday morning, so there is no ground for complaint against the respondents for not beginning to unload earlier than Monday morning. But I further find from the proof that there was an unreasonable delay of two days after the unloading commenced, for which the libellants should be compensated; and, from the proof in the case, I fix the rate of compensation at \$60 a day. There will, therefore, be a decree in favor of the libellants for \$120, and the costs of the case.

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THE WALTER M. FLEMING.

(District Court, E. D. New York. September 28, 1881.)

1. EQUITY—DELAY.

Delay defeats equity. So *held*, where one slept on his rights for seven years, and then invoked the aid of the court against a purchaser for value who had been in possession of the property for nearly that length of time with the knowledge of the libellant, and without objection on his part.

*L. R. Stegman and E. G. Davis*, for libellant.

*Benedict, Taft & Benedict*, for respondent.

BENEDICT, D. J. The libel in this case, by reason of its curious and uncertain averments, presents questions that I pass over to determine the question raised by the evidence; namely, whether, upon the facts proved, a case is made calling for the interposition of this court to take the possession of the canal-boat *Walter M. Fleming* from *Cornelius Vanolinda*, who now has the same, and give it to the libellant.

The facts are largely in dispute, according to the libellant's testimony. He being the owner and in possession of this boat in July, 1874, at Rochester, New York, made an agreement with one *Charles Vanolinda* to sell the boat for a certain sum—\$150 down, and the balance within 30 days. The \$150 was then paid by the buyer, and



the boat was delivered to him, since which the libellant has seen nothing of the boat or the buyer until the commencement of this suit, and has received no part of the purchase money except the \$150. What the full consideration was agreed to be libellant does not recollect, but he thinks it was over \$500, and he thinks that no bill of sale of the boat was ever given by him.

Nothing of all this appears in the libel, which contains no allusion to either Charles or Cornelius M. Vanolinda, and makes one Wright the party defendant, with whom it is evident the libellant has no controversy. But assuming the libellant's recollection to be accurate, which evidently it is not in all respects, and assuming that the state of facts sought to be made by the libellant's testimony is admissible under his libel, his action cannot be maintained; for, according to the libellant's testimony, at the expiration of 30 days from his delivery of the boat to Charles Vanolinda, in July, 1874, he had the right to resume possession of the boat, and from that time to this he has made no attempt to exercise this right. The fact conceded in this case, that no bill of sale of the boat was given at the time of the delivery of the boat to Charles Vanolinda, is deprived of much of its ordinary significance as bearing upon the question whether the title was intended to be transferred by the circumstance that the libellant has no bill of sale. The only bill of sale proved is from William D. Callister to the libellant and one Mr. William H. Crennel. The libellant, doubtless, became possessed of Crennel's interest in the boat, but he has no bill of sale from Crennel. Assuming, however, that the omission to deliver a bill of sale to Charles Vanolinda, under these circumstances, be sufficient to compel the conclusion that there was no intention to part with the title to this boat at the time of the bargain with Charles Vanolinda, still it must in equity be held that any right to reclaim possession of the boat, upon failure of the buyer to perform his agreement, has been waived by this long and unexcused delay of some seven years. And this, certainly, when, as the claimant has proved, the boat was during this long period running upon the Erie canal, and both Charles Vanolinda and the present possessor, Cornelius Vanolinda, had been seen by the libellant on more than one occasion without any demand of the possession ever being made, and when no obstacle existed to prevent the libellant from resuming the possession at any time. It was the libellant's duty, if he intended to reclaim possession of the boat, to do so within a reasonable time after the default; and he cannot be permitted to wait seven years, and then without demand apply to have the court put him in

possession as against one who, according to testimony that has not been disputed, bought the boat in 1875, paying full value therefor, and since then has been in peaceful possession of the boat, with the knowledge of the libellant and without objection on his part.

The libel is dismissed, with costs.

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### THE OLD NATCHEZ.

(*District Court, S. D. Mississippi. 1881.*)

#### I. DISMANTLED WATER-CRAFT—SALVAGE.

Salvage services can be rendered to a dismantled steam-boat, moored on a navigable river, and undergoing alterations and repairs for the purpose of being fitted for use as a wharf-boat.

In Admiralty.

*Albert M. Lea*, for libellant.

*W. B. Pittman*, for claimant.

HILL, D. J. The questions for decision arise upon the libel, answer, and agreed state of facts, from which it appears—

That the vessel arrested was formerly used in navigating the Mississippi river; that she became unfit for that service and was dismantled of all her machinery and other appurtenances necessary for such use, leaving the hull, cabin, and outer construction; that she was purchased in this condition at Cincinnati, and by her owners removed to a landing near the city of Vicksburgh, for the purpose of being repaired and fitted for use as a wharf-boat for shippers and passengers upon and across the Mississippi river at Vicksburgh, or those shipped to and from said port upon vessels plying upon said river; that she was moored to the bank of said river by such cables and fastenings as are used upon steam-boats for said purposes, and was undergoing the necessary repairs and alterations to fit her for the uses intended; that there was moored to and fastened by her side a barge loaded with coal, which caught fire, and which fire communicated to the Natchez. Libellant, discovering the fire, went to the rescue, awoke the watchman on the Natchez, and with the aid of another, who came to their assistance, cut loose the burning barge, sent her adrift, and extinguished the fire on the boat. In this service they encountered considerable heat and smoke, and some personal hazard, and libellant now propounds his claim for compensation as a salvor. The owners of the boat deny that she is liable to any salvage charge whatever.

To entitle a salvor to compensation the article saved and upon which the charge is made must, at the time the services are performed, be upon or washed from the sea, or some navigable stream, and must be something used in navigating the stream or sea, or as

an article of commerce transported upon the sea or navigable stream, which includes all descriptions of water-craft used, or intended to be used, in conveying persons or property on or across such navigable stream, and the cargo transported thereon, or some article of commerce transported by being itself floated thereon. The liability depends upon the use then being made, or intended to be made, of the vessel or other article, and not upon the mere fact that it is at the time afloat.

In the case of *The Hendrick Hudson*, 3 Ben. 419, the boat, like the one in this case, had been used as other steamboats, but had been dismantled and used as a hotel and saloon at different places upon the Hudson river, and while being removed from one place to another it was necessary to have her pumped out to keep her afloat and enable her to reach the point where she was to be again stationed to be used for the same purpose. A claim was made for this service, and rejected for want of jurisdiction in the court; Judge Blatchford holding that to entitle a party to salvage compensation in admiralty the vessel or other thing must be in some way engaged in navigation or commerce, or must be so intended, although it may then be floating upon a navigable stream. This, I am satisfied, is the correct doctrine, and brings us to the question as to whether or not the Natchez was, at the time the service was performed, intended to be used in aid of navigation or commerce. Wharf-boats are buoyant upon the water, and fastened to the bank of the stream in such a manner as to form a communication between the land and the vessels loading or unloading, or receiving and landing passengers and freight, and are so constructed as to be capable of being removed from place to place so as to enable the vessels to land and receive their cargoes at any stage of the water, and in these respects are important aids to commerce and navigation, much more so than any kind of stationary wharf, and especially so upon the Mississippi river, whose banks are so changeable. Therefore, being floated upon the water and movable, and being in aid of commerce and navigation, I can see no reason why this kind of water-craft should not be liable to a charge for salvage. It is not necessary that the vessel or other thing should be at the time so employed. If she was intended for such use it is sufficient, as held in the case of *The Cheeseman v. Two Ferry-boats*, 2 Bond, 363.

I am satisfied that libellant is entitled to salvage compensation for his labors and risk in saving the property seized, but it is difficult, under the pleadings and agreed facts, to say how much. There is

no definite rule. It may be by a ratable portion of the value of the property saved, or it may be a sum in gross. The value of the property at the time is not fixed by the agreement. It is agreed that the boat cost \$4,000 and the repairs \$2,000; that she was insured for \$5,000; and that recently, in negotiations for her purchase, claimants held her at \$12,000; but what changes had been made in the value does not appear, or whether the boat was in fact worth that sum is not stated. It is agreed that the costs and repairs up to that time amounted to \$6,000, and it is the value at that time and not subsequently that must be taken as a basis, if value is considered. It seems to me that, whether the amount be considered in gross or ratably according to value, \$500 is a fair compensation to libellant for his services. The service was not long, nor is it claimed that there was much hazard. Libellant was the discoverer of the fire and mainly instrumental in the rescue. He is therefore entitled to a greater compensation than Stricker, who came to his aid. The watchman, whose dereliction of duty caused the danger, can claim nothing.

Libellant will be allowed the sum of \$500 and full costs, for which let a decree be entered.

See same case on appeal, *infra*.

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#### THE OLD NATCHEZ.

(Circuit Court, S. D. Mississippi. 1881.)

Decision of the district court, *ante*, 476, affirmed.

In Admiralty. On appeal.

PARDEE, C. J. In the summer of 1879 the steam-boat Natchez was taken to Cincinnati, Ohio, and dismantled, and stripped of her boilers, engines, and paddle-wheels. Her cabin was stripped of its furniture, her smoke-stacks were taken down, and everything that could be made available in the construction of a new steam-boat was taken off. There remained of the old boat the hull, the cabin, the texas, the hog-chains, running from stem to stern, the fore and aft capstans, the stair steps leading from the lower to the boiler decks, her boiler deck, and hurricane roof. She was without motive power of any kind, and remained moored at Cincinnati until the fall of 1880, when she was purchased by the Vicksburgh Wharf & Land Company, and then towed to Vicksburgh, in this state, and moored to a landing

about half a mile from the city. Carpenters were put to work on her, changing her decks, erecting a cargo-box, and otherwise remodelling and preparing her for a wharf-boat. These repairs had not been completed on her, and she was engaged in no manner in commerce or navigation, when in the night-time of July 19, 1881, the libellant discovered her to be on fire, with her watchman on board and asleep, and no other assistance at hand. By the efforts of libellant the hull or hulk, or barge or wharf-boat, was saved. At this time there was, in the interest of claimants, insurance to the amount of \$5,000 "on the hull, cargo-box, tackle, and apparel of their wharf-boat Natchez, lying at," etc., conceded to be the same hull or hulk, or wharf-boat, saved by libellant and libelled herein.

The claimant resists the claim for salvage on the ground that the court is without jurisdiction because the Natchez was a mere hulk, without motive power of any kind, and was not engaged in commerce or navigation, and was destined for a wharf-boat. The district court maintained jurisdiction and allowed salvage on the ground that the Natchez was a floating boat or vessel on a navigable stream, fitted for a wharf-boat, and, as such, intended to aid commerce and navigation, and supported the decision with the case of *The Cheeseman v. Two Ferry-boats*, 2 Bond, 363. The claimant relies in this court on the case of *The Hendrick Hudson*, 3 Ben. 419, and makes the argument that at the time the alleged salvage services were rendered the Natchez was not engaged in aiding commerce or navigation, and at that time, or as a wharf-boat, she was not subject to any maritime liens or responsibilities.

The facts of *The Hendrick Hudson* are entirely different from the facts of this case. The Hendrick Hudson was aground, destined to continue so, and she had been converted into and used as a "saloon and hotel," and she was only to be floated so as to reach a more eligible location. She was no more subject to admiralty jurisdiction than would be a hotel on a wharf.

The reasoning in the case of *The Cheeseman* fully sustains the judgment of the district court in this case, and, were it necessary, I might be willing to wholly base my judgment on the same ground. But it is not necessary, as the agreed facts in this case, as I have recited them, show that no matter what may have been the intention of her owners as to future use, the dismantled Natchez still retained all the characteristics and distinctive features of a water-craft, capable of being used in commerce and navigation, and she was afloat on waters over which the courts of the United States have admiralty

jurisdiction. As such water craft she was insured by her owners. As a barge or lighter she may be in use to-day. As such water-craft she could be in impending peril on a public, navigable river, and could be rescued from such peril by maritime service.

Salvage is compensation for maritime services rendered in saving property or rescuing it from impending peril on the sea, or on a public navigable river or lake where interstate or foreign commerce is carried on. See Marvin, Salvage, § 97. Under this definition it will be noticed that the property saved need not have motive power, nor be engaged in commerce or navigation, to be subject to salvage. Nor do I see how the intended destination of the property can affect the question. Conceding that the actual use of the property may determine the right to salvage, as was decided in the *Hudson Case*, yet here the *Natchez* was not yet used as a wharf-boat, but stood upon the same footing as any other barge moored to the bank of the river waiting to be loaded, towed away permanently, tied up, or broken up, as the business or interests of the owners might suggest or require. Whether a boat fitted, arranged, and actually used as a wharf-boat can be the recipient of maritime services in saving her from impending peril, so as to make her liable for salvage, it is not necessary to decide.

The argument made, that in the conceded condition and position of the *Natchez* she was not subject to maritime services, liens, and responsibilities, is not well supported. Under the law of Mississippi she could be the subject of liens which this court would recognize, and in proper cases enforce. See Code, Miss. § 1395. She could have been liable in cases of collision, and she was a subject for maritime contract as per insurance in this case.

In my judgment the decree of the district court in this case was correct, in maintaining jurisdiction and holding that libellant was entitled to salvage compensation. Let a decree be entered in this court in terms the same as was entered in the district court, with costs.

## UNITED STATES v. LEVERICH and others.

*(District Court, S. D. New York. November 2, 1881.)*

## 1. PRACTICE AT COMMON LAW—JUDGMENT ON DEMURRER.

At the common law a judgment on demurrer was a final disposition of the case, unless leave was given at the same term of the court to withdraw it and plead over.

## 2. PRACTICE UNDER THE NEW YORK CODE OF PROCEDURE—ORDER OVERRULING DEMURRER.

Under the New York Code of Procedure, where, upon demurrer to an answer setting up new matter in defence, an order is entered simply overruling the demurrer, and no reply to such new matter is required in order to go to trial, *held*, that such an order, not directing final judgment, is, in practice, equivalent to an order to proceed to trial upon the issues raised by the answer as it stands, and that no other formal withdrawal of the demurrer is necessary.

## Motion to Strike Cause from the Calendar.

*S. L. Woodford*, U. S. Atty., and *E. B. Hill*, Asst. Dist. Atty., for plaintiff.

*Miller & Peckham*, for defendants.

BROWN, D. J. The plaintiff demurred to new matter in the answer which did not constitute a counter-claim, but was set up as a defence to the action. This is authorized by section 494 of the New York Code of Procedure. After argument the demurrer was overruled. The defendant thereupon prepared an order for signature, overruling the demurrer and ordering judgment for the defendant, with costs. On inspecting the order on file, it appears that the judge struck out the words "ordering judgment for the defendant on the demurrer," leaving simply the words "overruling the demurrer." The defendant entered this order and served upon the plaintiff a copy of it, and afterwards admitted due service of a notice of trial for this term. He now moves to strike from the calendar as improperly there, because no order has been entered giving leave to the plaintiff to *withdraw* the demurrer and proceed either to reply or to go to trial upon the issues of fact raised by the answer, as denied by implication, under the provisions of the New York Code, § 522.

The practice at common law, and in this state prior to the Code, was well settled, that if a demurrer to a plea or answer for insufficiency were overruled, the defendant had judgment of *nil capiat*, that the plaintiff take nothing by his writ, and this operated as a final judgment, (1 Burr. Prac. 251; 2 Arch. Pr. 11, 225; *Brevoort v. Brevoort*, 40 N. Y. Supr. 216; *Cooke v. Sager*, 2 Burr. 754;) but the court

might give the party in fault leave to *withdraw* the demurrer and reply on terms, although this was allowed only during the same term of the court. *Currie v. Henry*, 3 Johns. 140; 7 Cow. 101.

In the theory of pleading the issue of law raised upon a general demurrer to a pleading completes the record of the case to be tried, and judgment follows logically for the one party or the other according to the decision upon this issue. Theoretically, it is as much a determination of the case which the record presents as a verdict upon an issue of fact; and if there be but one count or plea, a decision of the sufficiency of this upon demurrer disposes finally of the whole case which the record shows, unless a different record be allowed to be made up and thereafter presented. The usual mode of doing this has long been to permit a *withdrawal* of the demurrer. 1 Burr. Pr. 251; *Douglass v. Satterlee*, 11 Johns. 22; *County of Dallas v. Mackenzie*, 94 U. S. 660, 664. This permission has always been within the discretion of the court, as it is also declared by section 497 of the Code, and it is sometimes refused. 2 Sandf. 673; *Lowry v. Inman*, 6 Abb. (N. S.) 394; *Osgood v. Whittelsey*, 10 Abb. 134; 7 Robt. 480.

The mere decision of the court upon a demurrer, holding it good or bad, does not dispose of the record. The order or judgment entered upon the decision ought to indicate what is intended. If the new matter in the answer be such as under the Code requires a reply, leave to reply would be necessary; and such leave to reply would be a sufficient withdrawal of the demurrer. In this case there was no new or further pleading by the plaintiff, and hence no need of providing therefor in the order entered on the decision of the demurrer. Had the court intended to enter judgment for the defendant upon its decision the clause to that effect, asked for by the defendant, would not have been stricken out. In striking out this permission for judgment the intention of the court was apparent that the cause should proceed to trial upon the complaint and answer as upon a formal withdrawal of the demurrer, which had been overruled. If judgment is not ordered that is necessarily the only alternative for disposing of the cause; and although a recital of leave to withdraw the demurrer would be more explicit, and more in accordance with the printed forms, yet where, under the Code, no further pleading is necessary, and judgment on the demurrer is not allowed, an order "overruling the demurrer" may, I think, be fairly held to imply and include a permission to withdraw the demurrer and proceed to trial upon the issues as they stood prior to the demurrer. Such, I am informed,



has been the understanding of other judges of the United States courts in this district, and as the defendant has in this case admitted due notice of trial of the issues of fact, since his entry of the order overruling the demurrer, it would seem that he also must have had the same understanding. The use of this form of order, upon this construction of its meaning and effect, has prevailed to a considerable extent, and no reasons of importance are shown for disturbing this practice. The motion should be denied.

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SMITH and others v. SCHWED and others.

(Circuit Court, W. D. Missouri, W. D. November, 1881.)

1. FRAUDULENT JUDGMENTS—EVIDENCE.

A transaction is admissible in evidence, if it can be connected with the transaction in controversy as part of a connected scheme to defraud.

2. SAME—BONA FIDE DEBT—DEFAUDING OTHER CREDITORS—JUDGMENTS SET ASIDE.

If the purpose of a creditor in obtaining a judgment is not to collect his debt, but to help the debtor cover up his property, his judgment will be set aside, though it be shown that his debt was *bona fide*.

3. FEDERAL COURTS—IRREGULARITIES IN JUDGMENTS OF STATE COURTS.

A federal court will not set aside a judgment of a state court for a mere irregularity, when the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, a bill of review, or an appeal.

4. REMOVAL OF CAUSES—SUBJECT-MATTER OF THE SUIT.

A bill in chancery that had been filed in a state court to enjoin a judgment creditor from proceeding to enforce his judgment, and to set it aside, was removed to a federal court. Prior thereto the complainants had brought and prosecuted to judgment attachment suits against the judgment debtor, and the property attached had been sold by order of court and the proceeds remained in the hands of the sheriff. The bill prayed for the payment of their judgments out of this fund. *Held*, that the fund in the hands of the sheriff was no part of the subject-matter of the suit which had been removed, and that the court had no control over it.

In Equity.

This is a bill in equity brought to set aside a judgment rendered in the circuit court of Jackson county, Missouri, on the twenty-sixth day of January, 1880, in favor of respondent Heller, and against respondents Schwed & Newhouse, for \$9,512.50. The judgment was by confession, and it appears upon its face to have been upon a promissory note given by said Schwed & Newhouse to said Heller. The bill charges that the judgment was confessed without consideration, and by fraud and collusion, for the purpose of hindering, delaying, and defrauding creditors. Schwed & Newhouse were, for some time prior to the

rendition of said judgment, engaged in business as wholesale jewelers in Pittsburgh, Pennsylvania, and at Kansas City, Missouri. Their store at Kansas City was established as a branch of their business in Pittsburgh. In the course of their business they borrowed money, from time to time, from the respondent Heller, and made numerous payments on account of such loans; but whether, at the time the judgment was confessed, there was a balance due, as claimed by respondents in the case, is one of the questions in dispute. On the same day in which the said judgment in the circuit court of Jackson county, Missouri, was confessed, another judgment, for \$5,009.33, was confessed by Schwed & Newhouse in favor of Heller, on another note, in the court of common pleas of Allegheny county, Pennsylvania. It appears that the alleged balance due from Schwed & Newhouse to Heller was divided into two notes,—one for \$5,000, and the other for \$9,000,—dated, respectively, December 22, 1879, and February 8, 1879, and each due one day after date, and on the former judgment was confessed in the Pennsylvania court, and upon the latter in the Missouri court. Executions were issued at once on both judgments, and the stores at Pittsburgh and Kansas City were simultaneously closed by the sheriffs.

Complainants, who are creditors of Schwed & Newhouse, instituted this suit in the state court to enjoin the execution of the judgment of the circuit court of Jackson county, Missouri, and to set the same aside as fraudulent. They also brought in the state court suit, by attachment, on their respective claims, and caused the Kansas City stock of jewelry to be attached. These attachment suits have been prosecuted to judgment in the state court. Since the institution of this suit the property attached (the stock of watches and jewelry) has been sold under an order of the state court, by the sheriff of Jackson county, Missouri, to one O. W. P. Bailey, who is made a party defendant herein, and the sum of \$8,250 was realized therefor, which sum is now in the hands of said sheriff to abide the final result of this litigation. The complainants pray for decree to set aside said judgment as fraudulent and void, and also for distribution of the fund in the hands of the sheriff among the several judgment creditors of Schwed & Newhouse.

This case was removed from the state court on the ground of the citizenship of the parties. The further facts, so far as necessary to be considered, are stated in the opinion.

*Botsford & Williams* and *Scarrett & Riggins*, for complainants.

*Bryant & Holmes* and *Tichenor & Warner*, for respondents.

MCCRARY, C. J. I will consider the several questions of law and fact in this case in the order in which they have been argued by counsel.

1. It is insisted on the part of the defence that proof of fraud in the confession of the judgment in Pennsylvania, and in the sale of the Pittsburgh stock under execution thereon, is not admissible to show fraud in the judgment in Missouri. The true rule upon this subject is this: It is not competent, for the purpose of showing fraud in a particular transaction, to show that the same party has been

guilty of fraud in another separate and independent transaction, not in any way connected with the matter in controversy. Courts will not go into such extraneous matters. But if the transaction sought to be shown in evidence can be connected with the transaction in controversy, as evidence of a connected scheme of fraud, it is admissible. *Clark v. White*, 12 Pet. 193.

Judged by this rule, I think the evidence tending to show fraud in the Pennsylvania transactions is admissible. The two transactions were manifestly but parts of one scheme; whether honest or fraudulent, is to be considered presently. They were between the same parties. The balance claimed by Heller as due him from Schwed & Newhouse was divided into two notes, and the collection of the sums due on said notes, respectively, was the ostensible purpose of the confession of the two judgments. They were rendered on the same day, and unquestionably in pursuance of an understanding between the parties. The two notes were, in fact, parts of the same debt. The two stores were branches of the same business, and the two judgments were, therefore, so connected together as to be justly regarded, for the purposes of this question, as parts of one transaction, to-wit, a scheme by which it was intended to procure judgments and executions in favor of Heller, and sell all the stock of Schwed & Newhouse, both in Kansas City and in Pittsburgh. There is also testimony tending to show that it was the purpose of the parties to prevent competition at both sales, so as to enable Heller to purchase the property for less than its value. Of this evidence I will speak in another connection. I mention it now only as bearing upon the question whether there was a connection between the transactions at Kansas City and Pittsburgh; and I say, without hesitation, that it is the duty of the court, under the circumstances of the case, to consider the whole transaction, embracing the proceedings at both places, in determining the question of fraud in the Missouri judgment.

2. Looking thus at the transactions, can it be said that fraud on the part of Heller is established by such a preponderance of proof as the law requires? This depends upon facts and circumstances shown in the evidence. The goods seized were worth largely more than the claim of Heller. The stock at Kansas City was worth at least \$14,000, and that at Pittsburgh probably as much. This circumstance of itself would have but little weight, for a *bona fide* judgment creditor has a right to levy upon property of his debtor of a value greater than his judgment; but the value of the goods seized in this case is significant, in view of the further fact, which is clearly established, that

there was a systematic effort both at Kansas City and at Pittsburgh to prevent the sale of the goods at their full value.

At Pittsburgh, the stock was levied upon and advertised for sale as "two large safes and contents, a large lot of clocks, lot of watch-makers' tools, one desk, four tables, three chairs, a lot of shelving," etc.; certainly, a very imperfect description of the valuable stock of watches and jewelry to be disposed of, and not well calculated to invite competition in bidding. At the sale only two bidders appeared, who were not there, apparently, in the interest of the defendants, and these were deterred from bidding by statements made to them by persons acting in the interest of Schwed, Newhouse, and Heller, to the effect that the goods were to be purchased for a friend of theirs, and that it was desired that outsiders should not interfere. Heller, who was personally present at the sale, requested one Koemer, who was present, not to bid, and offered him his choice of several articles of jewelry to desist from doing so. The sale was made in a hurried manner,—large lots of jewelry being sold in a lump,—and the whole stock, excepting a very few articles, was bid in by Heller, who never took possession of it, but left it with Schwed & Newhouse, who at once resumed business, with no change in the style of the firm, except to have printed on their sign, in very small letters, the word "Agts." It is claimed by respondents that Heller gave the stock to his sister, who was the wife of Schwed, one of the firm of Schwed & Newhouse, and that it was as her agent that the firm continued the business. If, however, it be true that Heller obtained the confession of judgment by an arrangement with Schwed & Newhouse, and with the intent to have the stock sold, bid it in, and gave it to the wife of Schwed, and if all parties combined to prevent competition at the sale, so as to accomplish this result, then the judgment and sale were fraudulent and void as to the creditors of Schwed & Newhouse.

I am inclined to the opinion that such a transaction is fraudulent, in law, for the reason that it is not a *bona fide* effort to collect a debt, but a method of transferring property from a husband to his wife so as to place it beyond the reach of his creditors, which the law will not tolerate. In this case, I am quite clear that the transactions from their inception were fraudulent in fact. If it had been otherwise, there would have been no effort on the part of Heller, Schwed, and Newhouse to prevent competition at the sale; on the contrary, they would have been anxious to see the stock sold for the highest possible price. If it sold for more than Heller's judgment, Schwed & Newhouse would have received the excess. In that event, Heller

would have received the money due him, and could have given it to his sister if so disposed. Why, then, did they all exert themselves so zealously to prevent competition and have all the goods struck off to Heller at low prices? Evidently, because it was their purpose to divest Schwed & Newhouse of their title, without, in fact, depriving them of the stock or breaking up their business. The judgment and sale were to be effectual as against creditors, but, for all other purposes, the business was to go on. It is impossible to believe that all this circumlocution was resorted to for the sole purpose of enabling Heller to make a present of the stock to his sister. If he believed Schwed & Newhouse were solvent, why did he not take the goods from them directly in payment for his debt? If they were willing to aid him to obtain the stock by confessing judgment and preventing competition at the sale, they would, of course, have been willing to turn out goods directly to him in payment. By this simple arrangement a large expenditure for costs would have been saved, and only creditors could have raised any valid objection to it. It is clear to my mind that Heller knew, or, at least, suspected, that Schwed & Newhouse were indebted, and that he combined with them, under cover of a judgment, execution, and sale, to transfer title to Mrs. Schwed before any of the creditors could be informed.

The resort to the expensive legal proceedings shown in the evidence, when debtors and creditor were acting together in perfect harmony, can be accounted for only upon this theory. I am strengthened in this view by the fact that there was great haste and apparent secrecy in the proceedings. Why, for example, if there were no other known creditors, was it deemed necessary to have the two judgments confessed in different states on the same day, and to have executions immediately issued and levied on both stocks? Enough has been said to show the fraudulent character of the proceedings at Pittsburgh; but it is earnestly contended that there is no sufficient proof of fraud in the judgment in Missouri, which is the judgment attached and sought to be set aside in this case. If I am right in the conclusion above stated, that the two transactions are so intimately connected as that they must stand or fall together, then the badges of fraud to which I have called attention are fatal to both judgments. But there is proof tending strongly to show that the scheme which was carried out at Pittsburgh was attempted at Kansas City, and was unsuccessful only because the sale was enjoined. Here, as at Pittsburgh, the goods were kept in a safe. As soon as the execution was placed in the hands of the sheriff, Newhouse, who was in charge of

the Kansas City stock, began to depreciate the value of the goods. He claimed that he could not open the safe to enable the sheriff to examine and schedule the goods. He stated that the goods were of cheap quality and not valuable, and suggested to the sheriff to sell the whole stock in bulk. He several times suggested the same as to the sale of the safe and its contents, and the sheriff thinks he asked him if the safe and contents could not be sold without opening it. This was very strange conduct on the part of a debtor whose goods were about to be sold on execution, and it can only be explained upon the theory that here, as in Pittsburgh, it was intended to sell the goods under the execution for the benefit and advantage of Schwed & Newhouse. If such was not the case, self-interest would have dictated to Newhouse to magnify rather than depreciate the value of the goods, and to use all means in his power to have them sold for the highest possible price.

Moreover, it appears from the testimony that the representations of Newhouse, as to the value and character of the goods, were untrue. After the safe was opened, and the goods came to be examined by an expert, it was found that instead of being of the cheapest kind, and such as peddlers usually sell through the country, as represented by Newhouse, one-third of the goods were solid gold, and nearly all the balance were plated, and that the actual value of the stock, in the opinion of the expert, instead of being very small, and not over \$5,000, as represented by Newhouse, was from \$15,000 to \$16,000, wholesale, and \$20,000 to \$22,000, retail. It appears further that after the levy Newhouse requested one Schribner, who had been acting as traveling agent for the Kansas City house, to remain in Kansas City, as the business would go on after the sale as before. This request must have been made with the expectation on the part of Newhouse that he, or the firm of Schwed & Newhouse, would be allowed to retain the stock after the sale in the same manner as in the case of the Pittsburgh stock. All these circumstances, and others which might be mentioned, lead inevitably to the conclusion that the judgment, execution, and levy in Kansas City were parts of a scheme by which, in connection with like proceedings in Pittsburgh, the two stores of Schwed & Newhouse were to be sold for the purpose of hindering, delaying, and defrauding creditors, and placed in the name of the wife of Schwed. The proceedings in both courts would, in my judgment, be equally void if the purpose had been to sell the Kansas City stock to pay any sum due Heller, and at the same time to transfer, under the form of a judicial sale, the Pittsburgh stock to the wife of Schwed, to be held in her

name for the benefit of Schwed & Newhouse. Such being the scheme, it would be impossible to hold it valid as to part and void as to the remainder. That Schwed & Newhouse acted with fraudulent intent is entirely clear. It would be difficult to imagine a more outrageous fraud upon creditors than appears to have been deliberately attempted by them. In the course of about six months they made purchases of merchandise on credit from 51 merchants, aggregating some \$25,000, and then suddenly undertook, through confessions of judgments and sales, to transfer the very goods for which these debts were in large part contracted to a brother-in-law of one of them, with the understanding that he would allow them to retain the goods, and go on with the business under the guise of an agency.

There is no room for question here except as to whether Heller had notice of the fraudulent purpose of Schwed & Newhouse. I have already given some of my reasons for holding that he had notice. The transactions were extraordinary, unusual, and suspicious. The relations between the parties afford strong ground for the conclusion that Heller was fully advised as to the condition and purposes of the firm. Their conduct was such as to put him on inquiry and lead him to infer that they were trying to put their property beyond the reach of creditors; and, as already suggested, the conduct of Heller himself can be explained only upon the hypothesis that he knew the purpose of Schwed & Newhouse to be to defraud creditors, and intended to aid them in that purpose.

3. In view of what has been said, it is unnecessary to decide the question whether Schwed & Newhouse were *bona fide* indebted to Heller in the full amount of the judgments confessed. If it were necessary to decide this question I would examine the evidence very carefully, as I am not at present satisfied as to what the fact is. Being satisfied that the judgment was fraudulent,—in fact, given and taken with a deliberate purpose to defraud,—I hold that it must be set aside, independently of the question of the *bona fides* of Heller's claims. A creditor having a demand, however just, cannot use it as a means of defrauding other creditors of the same debtor. In a fair race for preference, if he, by diligence, secures an advantage, it may, perhaps, be maintained; but if his purpose is not to collect his debt, but to help the debtor cover up his property, he cannot shield himself by showing that his debt was *bona fide*.

4. It is alleged in the bill that the judgment in question is void because not entered in accordance with the statute of Missouri regulating the confession of judgments. It is said that the statement

upon which the judgment was rendered was defective, in that it did not set forth the facts out of which the indebtedness evidenced by the notes arose; and, as authority for the proposition that this is a fatal defect, we are cited to the case of *Chappel v. Chappel*, 12 N. Y. 215.

On the other hand, it is insisted that the statement and affidavits upon which the judgment was confessed were in all respects such as the statute requires. I do not go into the question because I am clearly of the opinion that it is one over which this court has no jurisdiction. The federal courts will not entertain jurisdiction to set aside the judgment of a state court for mere irregularity, or in a case where the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, a bill of review, or an appeal. The proceedings in all such cases are to be regarded as supplementary to and connected with the original suit, and must be instituted in the same court with the original proceeding. This court can only take jurisdiction where the bill is in its nature a separate, independent, and original suit. *Gaines v. Fuentes*, 92 U. S. 10; *Barrow v. Hunton*, 99 U. S. 80.

5. I come now to a question of considerable importance in its application to this and other cases. Can this court decree a distribution of the fund now in the hands of the sheriff of Jackson county, Missouri, as proceeds of the sale of the property attached in the several attachment suits instituted by the complainants herein, in the state court, against Schwed & Newhouse. It will be observed that these attachment proceedings were instituted and conducted to judgment in the state court, and that the sale under which the sheriff holds the money in question was made in the attachment suits by order of that court. It is only the bill in chancery instituted in the state court to enjoin the Heller judgment, and set it aside, that has been removed to this court. True, the bill contains a prayer for the payment of the complainant's judgments out of said fund, but the main purpose of the suit, and the feature of it which enables this court to take jurisdiction, was the prayer for a decree setting aside the judgment of Heller for fraud.

It is well settled that the removal of the cause to this court brought with it the subject-matter of the controversy, so as to enable the court, by final decree, to dispose of the same. What was the subject-matter of this suit, which, by the removal, was brought within our control? Clearly, it was the judgment and execution in the case of Heller against Schwed & Newhouse, and not the money in the hands of the sheriff, received by him in the course of proceedings in the attach-



ment cases. These latter cases, not having been removed to this court, remain, with all their incidents, in the hands of the state court. We have no authority to make any decree disposing of property which is within the control of another court of co-ordinate jurisdiction. The state and federal courts of this country, sitting as they do in the same localities, and exercising a concurrent jurisdiction over many subjects, have great reason to observe with care the well-settled rule that the court which first gets possession of the subject-matter of a controversy must keep it until the controversy is decided, unless deprived of it by superior authority. In this case there will be a decree setting aside the judgment mentioned in the bill, but no order for the distribution of the fund in the hands of the sheriff.

Application for such an order must be made to the state court.

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*In re BRIGHT, Bankrupt.\**

(District Court, E. D. Pennsylvania. November 11, 1881.)

1. BANKRUPTCY—DISCHARGE—ASSENT FRAUDULENTLY PROCURED—ESTOPPEL.

A creditor, whose assent to the bankrupt's discharge was procured by the promise of a pecuniary consideration, is estopped from afterwards setting up the fraud as a ground of objection to the discharge; but other creditors, upon learning of the fraud, may object to the discharge upon that ground.

Motion for Discharge.

The register, to whom was referred the specifications against discharge, reported the testimony, the material parts of which are referred to in the opinion, and recommended the discharge of the bankrupt.

*A. P. Spinney*, for bankrupt.

*Benj. H. Haines* and *J. M. Washburne*, for creditors.

BUTLER, D. J. The specification of objection that Mr. West's assent to the discharge was procured by the bankrupt, or by Mr. Torry for him, by means of a pecuniary consideration, is fully sustained by the proofs. Mr. West, when his assent was applied for, demanded \$1,000, which the bankrupt declared himself unable to furnish. Mr. West pointed to the judgments held by Mr. Torry, as a means of securing it. These judgments, which had been entered in Mifflin county as well as in Schuylkill, had simultaneously been sued out in both places; and while it seems that the entire amount due was realized in Schuylkill, \$1,000, or nearly so, were collected, and still

\*Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

in counsel's hands, in Mifflin. This money in Mifflin was pointed out by Mr. West as a means of securing what he required. The suggestion was adopted by the bankrupt; and by arrangement between himself, Torry, and Mr. West, the judgments were transferred, to enable the latter to obtain the money in Mifflin county. After the assent was thus obtained, it was discovered that this money, (which, it would seem, should have passed to the assignee in bankruptcy, as the property of the bankrupt,) had previously been transferred by Mr. Torry to others, on the bankrupt's account. Mr. West, in consequence, realized nothing on his transfer. This latter fact, however, is unimportant. His assent was obtained by means of the pecuniary consideration held out. That this consideration failed, and he was disappointed, is immaterial. He fully expected to obtain the money; and it is quite probable the bankrupt and Torry united in this expectation, for the former testifies that he did not know of the previous transfer, and the latter says he had forgotten it. In the assignment it is expressly stated that no such previous transfer had been made. I have no doubt that both West and the bankrupt expected the money to be paid on the transfer to West. West certainly did. Whether the bankrupt did or did not is immaterial; he held out this consideration, and by means of it obtained the assent. Still, if Mr. West alone appeared to resist the discharge we would hold *him* estopped, as respects this objection. Being a party to the fraud, we would not permit him to set it up, in his own relief. He complains only because he did not succeed in obtaining the unfair advantages which he sought. If he had received the money he would have been satisfied, and allowed his co-creditors to suffer from his fraud. But while the objection will not avail Mr. West, other creditors, who appeared on learning the facts, may urge it. They are not too late. They knew nothing of the fraud until the quarrel between the parties to it revealed the facts. That Mr. West may derive advantage from their interference is unimportant; the bankrupt is not in position to object.

Without noticing any other specification presented, it is sufficient to say that this is fatal. As the case stands the discharge cannot be allowed.

*In re JACKSON, Bankrupt.**(District Court, S. D. New York. November 16, 1881.)***1. INJUNCTION DISSOLVED—SECTION 5057—LIMITATIONS—FRAUDULENT JUDGMENT.**

An injunction should be dissolved when it can no longer subserve any useful purpose.

Where, prior to proceedings in bankruptcy, several executions had been levied on the bankrupt's property, and the sheriff had advertised it for sale thereunder, when he was stayed by injunction issued in the bankruptcy proceedings, but was afterwards allowed to sell and hold the proceeds, subject to the order of the court; and after paying certain prior executions, about which there was no controversy, there remained in the sheriff's hands \$611, applicable next in order upon a judgment and execution of M.; but it was claimed by the assignee in bankruptcy, and also by certain subsequent execution creditors, that M.'s judgment was fraudulent and fictitious, and M.'s proceedings under it had been stayed since 1874, and the assignee, though knowing the facts since 1875, had taken no steps to assail M.'s judgment,—*held*, that the assignee's right to attack M.'s judgment had, under section 5057, long since expired, and that the injunction should now be dissolved.

**In Bankruptcy.**

*Jas. Armstrong*, for the motion.

*Jas. G. Graham*, for the assignee.

*Darwin W. Esmond*, for creditors.

BROWN, D. J. Markowitz, the moving creditor, by virtue of a judgment, execution, and levy prior to the commencement of proceedings in bankruptcy, obtained a legal lien upon the goods and chattels of the bankrupt. The goods were under advertisement for sale under this execution, and others, at the time of the filing of the petition in bankruptcy, on December 8, 1874. On that day an injunction was issued out of this court in those proceedings, restraining further proceedings by the sheriff. Afterwards it was so modified as to permit the sheriff to sell all the goods and chattels of the bankrupt levied on, and to retain the proceeds to abide the further order of the court. He was also permitted to pay two judgments prior to that of Markowitz, there being no controversy about them. After paying those judgments and the expenses of sale, a net balance of \$611.39 remained in his hands, which was then, and has ever since been, claimed by Markowitz under his judgment of \$2,040, which was next in order of lien. Payment to him has been prevented by the original injunction, which, as respects this judgment, has never been vacated, it being claimed, not only on behalf of the assignee in bankruptcy, but also in behalf of two subsequent judgment creditors, that that judgment was fraudulent and collusive, and designed to give an unlawful preference to Markowitz, who is a brother-in-law of the bankrupt.

The assignee in bankruptcy was chosen on March 25, 1875. On the nineteenth day of April, 1875, he applied to this court for an order upon the sheriff to show cause why the balance of \$611.39 should not be paid to him as assignee. The order was refused by Judge Blatchford, who indorsed upon the papers that the relief must be obtained by plenary suit. The money in the sheriff's hands stands in the place of goods which were already subject to the lien of the judgment at the time of the commencement of the proceedings in bankruptcy. If the judgment was collusive, and designed to give a fraudulent preference, as alleged, it was voidable at the suit of the assignee. Such a suit by him to displace the apparent legal lien of the judgment, and to recover the property for the use of the general creditors, would be within section 5057 of the Revised Statutes, because against a person claiming an adverse interest touching rights of property transferable to or vested in the assignee. Had the assignee possessed himself of the goods or the proceeds, notwithstanding this lien, the judgment creditor must have been limited to two years in which to assert his right to the goods; and the assignee must be held limited to a like period from the time of his discovery of the fraud or illegality. *Bailey v. Glover*, 21 Wall. 342.

The papers on file, referred to on this motion, show that in April, 1875, the assignee, in his original application for the balance of the money, was apprised of the alleged collusion and fraudulent character of the judgment. The affidavit of Clark, the attorney of the petitioning creditors, not only stated the fact, but gave some evidence of it. No suit, however, has ever been commenced to assail the legal lien of this judgment. More than six years have elapsed since the charge of its fraudulent character was made by the assignee, and since he was apprised by the court that it could be assailed only by plenary suit. The assignee has appeared in opposition to this motion, but there is no evidence that he is any better prepared to commence such a suit now than he was six years ago, or is even proposing to recover this money. No reason appears why such suit should not have been commenced long ago, if it was desired or intended to contest the lien of this judgment, except, possibly, the assignee's want of the necessary funds to do so, which it must be assumed the creditors were not willing to advance. This cannot extend the statute of limitations. The object of the statute was to secure the speedy liquidation of bankrupts' estates. The injunction of December 8, 1874, was not an injunction upon the assignee's proceedings, but was for the benefit of the assignee to be thereafter chosen. He has not availed himself of

it in the only way it could become beneficial to the estate,—by a suit to set aside the judgment and obtain the money,—and the time for doing so has long since passed.

I cannot perceive anything possibly useful to the bankrupt's estate in continuing the injunction longer, and it ought, therefore, to be dissolved. By the operation of the statute of limitations the question of the validity of the judgment has long since passed beyond the scope of proceedings in bankruptcy; and the special interest of the two subsequent judgment creditors, in contesting the judgment, cannot be here considered, as it does not concern the general creditors.

The motion should be granted.

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*In re SHAW and another, Bankrupts.*

(*District Court, S. D. New York. October 18, 1881.*)

**1. EXECUTED COMPOSITION—ATTEMPT TO SET ASIDE—SALE BY THE BANKRUPT OF HIS STOCK—INADEQUACY OF CONSIDERATION.**

In a proceeding to set aside a composition in bankruptcy after it has been fully executed, a sale of the bankrupt's stock and fixtures, made prior to the adjudication in bankruptcy, will not be disturbed on the ground of inadequacy of price in a doubtful case, nor upon other grounds known to the creditors accepting the composition, although it might probably have been avoided by an assignee in bankruptcy.

**2. SAME—SAME.**

A creditor, who, with full knowledge of the schedule estimates, voted for the composition and received payment under it, is precluded from seeking to set aside the composition for mere inadequacy, or because it ultimately turns out that a larger amount might have been offered and paid, where the schedules show with substantial correctness the situation of the estate.

**3. SAME—ASSETS—BANKRUPT'S RIGHTS WITH RESPECT THERETO.**

A bankrupt from whom a composition is received is necessarily at liberty to deal with his assets as he chooses. The creditors have no concern in the matter if their composition be paid and no fraud practiced. He may pledge or sell his stock to one or more of his creditors to raise money to pay the composition, where there is no concealment practiced, or unfairness to others.

**In Bankruptcy.**

This was a petition filed in this court on the twenty-sixth day of June, 1877, by Frederick M. Peyser, to vacate and set aside a composition made by the above-named bankrupts with their creditors, confirmed by an order of this court on the first day of December, 1875, and to vacate and set aside the discharge of said bankrupts from their debts. The bankrupts were a firm engaged in the manufacture of blank books in the city of New York. On or about the seventh day of August, 1875, being unable to meet the payment of all their debts, they sold all their stock and fixtures to their clerk, Randolph

N. Smith, receiving therefor his notes and a chattel mortgage on all the said stock and fixtures as collateral security for the payment of the notes. On the twenty-first day of August, 1875, the bankrupts filed in this court their petition in voluntary bankruptcy. All subsequent proceedings were regularly taken. The notes and mortgages were entered on the schedules as a part of the assets of the bankrupts. The petitioner herein was present at the meetings of the creditors, voted for a composition of 15 per cent. in cash, and received full payment under such composition. The L. L. Brown Paper Company and the Whiting Paper Company were among the largest creditors of the bankrupts, and favored the composition. L. L. Brown and William Whiting were the active representatives of said companies, and they individually advanced the money needed to pay the debts of the bankrupts under the composition, and received in return therefor the assets of the bankrupts. The other facts sufficiently appear in the opinion.

*A. J. Taylor*, for bankrupts.

*Geo. H. Black*, for petitioners.

BROWN, D. J. The sale of the stock and fixtures to Smith, for the sum of \$58,228.50, would not be disturbed on the ground of inadequacy of price. This sum is more than there is any probability an assignee in bankruptcy could have made out of the property; and the evidence does not show its value was any more than that, if as much, considered as a gross sale of the whole stock in bulk. The sale is shown to have been a device merely to avoid immediate sale on execution in suits pending against the firm. On this ground it might probably have been avoided by judgment creditors, or by an assignee in bankruptcy; but it was in fact made, as the evidence shows, in the interest of the general creditors, and was, doubtless, so regarded by them. Smith was an employe of the firm. His notes, secured by mortgage on the stock, represented the whole price, and the possession was practically unchanged. It is scarcely possible that any creditor could have been deceived or misled by this thin disguise; and had there been any desire to disturb the arrangement so made, the creditors would have proceeded to choose an assignee in bankruptcy to set it aside. Instead of doing so they voted almost unanimously to accept a composition of 15 per cent. This was done with full knowledge of all the essential facts. The notes represented the full value of the stock. The schedules and the chattel mortgage apprised the creditors of the main facts; and had they desired any further information they should have examined the bankrupts before accepting the composition, as the law provides they may do, and intends they shall then do, as to any matters concerning which further information is needed. Section 5103; *Ex parte Walter*, 34 L. T. (N. S.) 701.

There is nothing, however, in the evidence, even as it now appears, so far as respects the amount of the bankrupt's estate, which would vary essentially the apparent amount of assets. The schedules showed about \$70,000 estimated assets, of which \$58,000 were notes of Smith, secured by the mortgage, being about 30 per cent. on the entire indebtedness; and that is the amount of dividend which Peyser, the petitioner, testifies Shaw told him the estate would pay. Page 453. The creditors, including the petitioner, with all this in full view, nevertheless voted to accept 15 per cent. cash, and the composition was approved by the court and paid. If any creditor was dissatisfied, on the ground that the estate would net a sum more nearly approaching to what the schedules showed, viz., twice the amount offered as a composition, it was his right and his duty to present his objections at the time. Least of all can a creditor, who, like the petitioner, voted for the composition and received payment with full knowledge of the schedule estimates, and after being told by the bankrupts that the estate would pay 30 per cent., be now heard in seeking to set the composition aside for mere inadequacy, and because the amount so offered and paid was not as much as the schedules indicated might have been offered; and the evidence does not prove any better condition of the assets substantially than the schedules indicated, if in fact as good. In the figures exhibited as to the subsequent business, no account is taken of expenses. *In re Herman*, 17 N. B. R. 440; *In re Marionneaux*, 13 N. B. R. 222.

The only additional ground for setting the composition aside is, as the petition alleges, that two creditors, the Whiting Paper Company and the L. L. Brown Paper Company, fraudulently represented to the petitioner that they were willing to take 15 per cent., whereas they were fraudulently conspiring to procure the assets for their own use by paying other creditors 15 per cent., in order to make their own debt in full. The evidence fails to establish any such design or result, or any case of fraud or conspiracy. Mr. Whiting and Mr. Brown, the active representatives of those two companies, made no representations of any kind to the petitioner, nor, as appears, to any other creditor, except undertaking to see the composition paid. After the adjudication in bankruptcy, these two companies signed the paper for a voluntary compromise at 15 per cent., which was not acted on because the signatures of some creditors, of whom the petitioner was one, could not be and were not obtained. The evidence does not show that anything more than possible proceedings in bank-

ruptcy were contemplated at the time of the sale to Smith. Had the plan alleged by the petitioner been in existence prior to the bankruptcy proceedings, viz., a plan to force a settlement at 15 per cent. for the benefit of Shaw, Whiting, and Brown, it is inconceivable that Shaw, after the bankruptcy, should have told Peyser, as the latter testifies, that the assets would pay 30 per cent. Page 453. This fact proves that there was no such plan, and confirms the direct testimony that the arrangement for paying the composition originated after the bankruptcy, and grew naturally out of the situation.

The evidence shows that these two companies found it greatly to their interest to maintain Mr. Shaw's large trade, if possible, as that was the principal outlet for the sale of their manufactures. They had aided Mr. Shaw before, and now, to keep up their business, Mr. Brown and Mr. Whiting, individually, were willing to advance 15 per cent. cash and take the assets for their indemnity. There is no evidence of concealment, collusion, or unfair advantage on their part over other creditors. At a meeting of creditors at the Fifth Avenue Hotel this arrangement was openly discussed. Mr. Whiting and Mr. Brown were desired to name some sum which they would advance and take the assets, and one other creditor is specified who was desired by them to join in raising the money, but declined.

A bankrupt from whom a composition is received is necessarily at liberty to deal with his assets as he chooses,—that is, his means of payment; and where cash is offered it is to be presumed that it is done by some immediate pledge or transfer of his assets. How or with whom this is effected is wholly immaterial to his creditors, so long as no fraud or unfairness is practiced upon them. *In re Reiman*, 11 N. B. R. 21, 45; *In re Van Auken*, 14 N. B. R. 425; *Ex parte Hamlin*, 16 N. B. R. 320, 322.

From the known fact that Shaw & Co. had no money themselves; that cash was the offered composition,—from the open talk by other creditors with Whiting and Brown in regard to their advancing the money, and the failure to examine the bankrupts in regard to their means of paying the offered composition,—it may fairly be assumed that the creditors generally either knew that Whiting and Brown were to advance the money, or else were too indifferent to make any inquiry on the subject. There being no fraud and no concealment, they are chargeable with knowledge of what they would easily have ascertained upon inquiry. And it could not have been supposed that Whiting and Brown would advance some \$30,000 to other cred-



itors except upon some arrangement to take the assets for their indemnity. Under the circumstances of the case the assent of the creditors thereto is, I think, to be plainly inferred; and in what manner they afterwards dealt with the assets, whether forming a company or corporation either with or without Mr. Shaw, is immaterial. Had Brown and Whiting individually been creditors, the case is therefore not essentially different from what an express arrangement between them and the other creditors would have been for them to advance the composition on the strength of the assets. Such an agreement is valid, although those making the advances thereby get paid in full; and such agreements are not infrequent in the English practice. *Bissell v. Jones*, 19 L. T. (N. S.) 262; *Ex parte Nichol森*, 22 L. T. (N. S.) 286.

But Whiting and Brown were not individually creditors of the bankrupts. They stand, therefore, as respects the creditors, in the same situation in which any other persons not creditors would have stood in regard to their right to treat with the bankrupts concerning an advance of money to enable them to pay the composition offered. The assets being fully released by the creditors to the bankrupts by force of the acceptance of the composition, the bankrupts are at perfect liberty to deal with third persons in regard thereto in any way they see fit, and the creditors have no concern in the matter if their composition be paid and no fraud practiced. All were paid promptly in this case, and I see no legal ground, therefore, for interfering with the composition which was accepted and performed. Whether Whiting and Brown eventually made any profits by means of these large advances, which, with the mortgage on the machinery paid off by them, amounted to some \$50,000, does not appear, and is immaterial. It does not appear that their own companies have received even the 15 per cent. dividend. But that also is immaterial, as it is their own fault if not paid. The testimony is that during the first two years, notwithstanding their large outlays and the appraisal of the stock at \$30,000, in forming the new corporation, the profits of the business were nothing. That they expected to make some profits may be assumed; and that the advance which they consented to make was fixed at a per centage which they thought safe, and such as would leave a margin of profit to themselves, is also to be assumed. To fix that per centage was the very subject of arrangement with the creditors at the time of the composition. In accepting the per centage offered, the creditors bound themselves to the amount thus fixed; and, as everything material is proved to have been known to some,

was matter of common discussion, was without concealment, and easily ascertainable by all who chose to make inquiry, the composition ought not now to be disturbed.

The petition should be dismissed, with costs.

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CAMPBELL v. THE MAYOR, etc., OF NEW YORK.

(*Circuit Court, S. D. New York.* November 9, 1881.)

1. LETTERS PATENT—STEAM FIRE-ENGINE PUMPS.

Letters patent No. 42,920, dated May 24, 1864, and issued to James Knibbs, assignor, for an improvement in steam fire-engine pumps, consisting in the use, in combination with the constant power of the engine to discharge a greater or less number of streams of water, and the same number through longer or shorter lengths of hose, of a passage from the discharge to the suction side of the pump, regulated by a valve, were not anticipated by the engines made by the Amoskeag Manufacturing Company, the engine made by Reaney, Neafe & Co., nor by the patents either of R. A. Wilder, of Joseph Bramah, or of Benoit Duportail.

2. SUITS TO DEFEAT A PATENT—MEASURE OF PROOF.

To defeat a patent the proof must be clear, beyond any fair and reasonable doubt.

3. PUBLIC USE OR SALE.

It must be a public sale or use with the consent or allowance of the inventor, that will invalidate a patent.

In Equity.

*George H. Williams*, for plaintiff.

*Frederic H. Betts and Wyllis C. Betts*, for defendant.

WHEELER, D. J. The plaintiff has title to letters patent No. 42,920, dated May 24, 1864, and issued to James Knibbs, assignor, for an improvement in steam fire-engine pumps, whereby such an engine, having constant power for discharging several streams of water through lines of hose of various lengths, may be made to throw fewer streams, or the same number through longer lines when the resistance to discharge would be greater, without varying the power, or causing undue strain upon the working parts or hose, by means of a passage from the discharge to the suction side of the pump, regulated by a valve, for the surplus water on the discharge side caused by the restriction upon the discharge. This suit is brought for an infringement of this patent, which is not denied, if the patent is valid. The validity of the patent is questioned upon the ground that Knibbs was not the first inventor of this improvement; that the same had been patented abroad prior to his invention; and that the same had been

in public use and on sale in this country for more than two years prior to his application. The anticipations relied upon are steam fire-engines which were made by the Amoskeag Manufacturing Company, of Manchester, New Hampshire, the steam fire-engine Philadelphia, which was made by Reaney, Neafie & Co., of Philadelphia, and the patent of R. A. Wilder, No. 27,662, dated March 27, 1860. The foreign patents are the English one of Joseph Bramah, No. 1,948, dated April 19, 1793, and the French one to Benoit Duportail, No. 19,532, dated June 12, 1857. The facts as to the existence, knowledge of, and use of the devices in these fire-engines are to be found from a comparatively large mass of evidence, consisting of documents, drawings, pictures, and the somewhat conflicting testimony of numerous witnesses as to various facts and circumstances. Upon the whole, after much examination and consideration, it satisfactorily, and beyond any fair doubt, appears that, prior to the invention of Knibbs, the Amoskeag Manufacturing Company made and put into rotary steam fire-engines manufactured by them a passage for water leading from the suction to the discharge side of the engines, which could be opened and closed by a valve, for the purpose of having water carried through it, and past the pumping apparatus, and discharged through the hose by hydrant pressure, when the pumps were not operating, which was used at places where there was hydrant pressure for that purpose; and that Reaney, Neafie & Co. made and put into steam piston fire-engines, tubes leading from the suction and discharge parts of the engine toward each other until they met, and in one tube, from the place of meeting to the boiler, which could be opened and closed by valves, one in each branch, for the purpose of taking water from either the suction or discharge side into the boiler,—the two branches leading from the suction and discharge sides constituting a passage controlled by two valves, through which water could be taken from the discharge to the suction side to relieve pressure on the discharge side; but it does not appear by that measure of clear proof, beyond any fair and reasonable doubt, which is necessary to defeat a patent, that either of these devices was ever, before that time, used for the purpose of passing water from the discharge to the suction side of the engines to relieve undue pressure on the discharge side, caused by reducing the number of discharge openings, or increasing the difficulties of discharge by lengthening the hose; nor that the utility of these passage-ways for that purpose was before that time known; neither does it at all appear that Knibbs derived any aid from either of these devices. The counsel for the

defendant, after insisting strenuously that the passages were in fact used for the purposes of Knibbs' invention, likewise insist that in view of the existence of these things, if that only should be found, Knibbs only put an old device to a new use, which would not be patentable. This presents the question, on this part of the case, whether such prior knowledge and use of a like device, as is found to have been had, will defeat the patent. His invention was not to be used under all circumstances of the use of the engine. It was for use only in combination with the constant power for a larger discharge, and a restricted discharge.

The second claim of the patent, and the only one in controversy, is for the connecting passage and valve for the purposes described and set forth, the principal of which purposes was the use in that combination. The statutes providing for defences to suits upon patents require defendants to set forth the names and residences of persons having prior knowledge of the thing patented, and where and by whom it had been used. Rev. St. § 4920. The proof must, of course, correspond with and support these allegations. The proofs in this case do not support the allegation that the persons knowing of and using the Amoskeag engines and the engine Philadelphia, as these persons are found to have known and used them, knew of and used Knibbs' invention. Those connected with the Amoskeag engines used the passage to avoid the pump, and those connected with the Philadelphia used only a part of it at a time, and then in connection only with contrivances for feeding the boiler, and neither of them used it in connection and combination with the working pump and over-pressed hose at all; and they respectively had knowledge coextensive with the use they made. They had brought together all the parts necessary to accomplish the result he accomplished, but did not know how to use them. This is not the known use required to defeat a patent. *Tilghman v. Proctor*, 102 U. S. 707.

Wilder's patent is for a two-way valve in combination with apparatus for feeding a steam-boiler with water, by which surplus water is returned to the tank. The combination with which it is made to work is entirely different from that in which this passage and valve are placed, and the working parts are not the same. The same may be said of the patents of Bramah and Duportail. Both were before steam-fire engines, with the necessities of their great and constant motive power, were known.

The facts in regard to use and sale of the invention prior to the application appear, from the evidence, to be that Knibbs was the

engineer of a steam fire-engine in use in the city of Troy for the protection of property there against fire, and in the latter part of April, 1860, applied his invention in the form of a pipe leading from the discharge to the suction sides of the engine, with a globe valve between. The invention was tried and operated satisfactorily, except that he thought that the passage was rather small. This engine, which was called the Arba Reade, was continued in use with the invention upon it, Knibbs continuing to be the engineer. In January, 1862, the city of Troy procured another steam fire-engine, of substantially the same pattern, to which, at the request of Knibbs, his invention was applied in the form of an opening through the partition between the discharge and suction sides of the pump, with a valve working to a seal as the opening through which the excess of water could be made to pass. This engine, which was called the J. C. Osgood, was put to use for the city, and the invention operated satisfactorily to Knibbs, as well as to others concerned. The tube to the Arba Reade was made larger in February, 1863, and worked more satisfactorily to all. Knibbs thought of applying for a patent, consulted a solicitor of patents about it, and made application for the one that was granted May 13, 1864, without at any time intending to abandon his invention to the public. In 1861, and consequently more than two years before the application, the Amoskeag Manufacturing Company made other steam fire-engines containing this invention, which were sold and went into use, and from that time until after the application such engines were occasionally made and sold by the company, and perhaps by other manufacturers, and went into the customary use. This was done without the consent and allowance of Knibbs.

It is contended that these uses and sales, either those with or those without the consent and allowance of Knibbs, will defeat the patent. This invention, like that in *Elizabeth v. Pavement Co.* 97 U. S. 126, could not well be experimented with and tested in private. Its object was connected with purposes in their nature public, and its practice was necessarily somewhat of the same nature. The invention was not essentially varied by the trials and use made, and was patented according to its features as first applied. Still, it was not clear to the inventor that no changes or modifications would be necessary, and necessary to be specified in the application for a patent, in order to obtain the full benefit of one. In this view the use by him as engineer, and by the city of Troy at his request, is deemed to have been experimental and allowable within the rule laid down in the case

cited. Still, if consent and allowance of the invention are not necessary to defeat a patent, the other sales and use were sufficient to accomplish that result. It has frequently been said, but in cases where the point was not directly raised, that such consent and allowance was not necessary. *Egbert v. Lippmann*, 15 Blatchf. 295; *Kelleher v. Darling*, 14 O. G. 673. And there are cases the other way. *Andrews v. Carman*, 13 Blatchf. 307; *Draper v. Wattles*, 16 O. G. 639.

In view of these differences of opinion or statement, it may be well to recur to the statutes. In section 7 of the act of 1836 it is provided that the commissioner shall make, or cause to be made, an examination of the alleged invention or discovery, and if it shall not appear, among other things, that it had been in public use or on sale with the applicant's consent or allowance prior to the application, and if the commissioners shall deem it to be sufficiently useful and important, it shall be his duty to issue a patent for it. In section 15 of the same act it is provided that a defendant in a suit for infringement may set up, among other things, in defence, that the invention had been in public use or on sale, with the consent and allowance of the patentee, before his application for a patent. These are the only provisions for preventing the issue of a patent, or a recovery for the infringement of one, on account of the invention being in public use or on sale, except some provisions as to the effect of foreign patents, not material to this question, which were in force when this patent was granted. The act of 1839 does not provide for preventing the issue of a patent on this account, and does not enlarge in any direction, but is restrictive of this defence. It saves to manufacturers and purchasers before the application for a patent the right to specific machines, manufactures, or compositions of matter, and provides that no patent shall be held invalid by reason of the sales, purchases, or use, except on proof of abandonment, or that the purchase, sale, or use has been for more than two years prior to the application. No purchase, sale, or use, after the invention, would prevent or invalidate a patent but for these provisions of the act of 1836, and it is against those provisions that the effect of the making, use, and sales of these specific articles is saved by the act of 1839. The use saved against is the public use mentioned in the act of 1836, as seems to have always been understood, although it is not mentioned as public in the act of 1839; and the being in use and on sale saved against are the public use and sale with the consent or allowance of the inventor mentioned in the act of 1836. *Draper v. Wattles*, 16 O. G. 639.

Upon these considerations there must be a decree for the plaintiff. The patent has expired, and therefore no injunction will be granted unless further moved for upon some special grounds. Let a decree be entered adjudging that the patent is valid and that the defendant has infringed, and for an account, according to the prayer of the bill, with costs.

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SPRING and others v. DOMESTIC SEWING-MACHINE Co.

(Circuit Court, D. New Jersey. November 18, 1881.)

1. LETTERS PATENT—LATHES FOR TURNING IRREGULAR FORMS.

The machine covered by letters patent issued to Charles and Andrew Spring, May 10, 1859, for an improvement in lathes for turning irregular forms, is not anticipated by the Pernot machine.

2. COMITY.

In patent cases a circuit court will follow a previous decision, rendered by the court of another circuit, where the same patent was a subject of controversy, only when the evidence that has been introduced in the two cases is substantially the same.

3. INFRINGEMENT—MEASURE OF PROOF.

Very slight proof of infringement is sufficient

*George E. Betton and Geo. S. Boutwell*, for complainants.

*John Dane, Jr.*, for defendant.

Before McKENNAN, C. J., and NIXON, D. J.

NIXON, D. J. The question of the validity of the patent on which this suit was brought was before the learned judges of the first circuit (Clifford and Lowell) at the term of October, 1874. It was there held that the complainants' patent was a valuable and ingenious improvement in lathes for turning irregular forms; that Charles and Andrew Spring were original and meritorious inventors of the said improvement; but that the patent should be declared void in view of the fact that the testimony showed that they were not the first inventors; that the patent was for a combination, all the elements of which were old; and that the same was anticipated by the machine of one Pernot, proved to have been made in New York, and operated there for several years in the manufacture of large quantities of sewing-machine needles. *Spring v. Packard*, 7 O. G. 341.

The great respect which we entertain for the opinion of that court, as well as interstate comity, would readily lead us to accept its decision as controlling this case, if the truth of the facts on which it was based were not controverted and seriously questioned here.

It is insisted by the complainants:

(1) That their proofs in the present case show the falsity of the testimony on which it is attempted to establish the existence of the Pernot machine, or, at least, that part of it embracing the mechanism which anticipates the Spring patent anterior to the date of the complainants' invention. (2) That, even if its prior existence is admitted, the mechanism is not an anticipation of the specifications and claims of the Spring patent.

1. As to the first point, respecting the actual existence of the Pernot machine, it is a well-settled principle that the burden of proof is on the defendant. Pernot, the alleged inventor, testifies that he completed and used it as early as the year 1853, for turning needles, and that it was substantially in the same condition and contained the same mechanism for curving the shoulders and sharpening the points of the needles at the time of his examination as a witness in this case, as when it was finished in 1853.

The claim of the Spring patent is for the combination of a gripping chuck, by which an article can be so held by one end as to present the other free to be operated upon with a rest preceding the cutting tool, when it is combined with a guide-cam or its equivalent, which modifies the movement of the cutting tool, all operating together for the purpose set forth. The distinguishing features of the patent are the cams or formers for turning the curved shoulders and the points of the sewing-machine needles.

The patentees, in their specifications, state that the pattern,  $e^1$ , which is adjustable by means of the set-screw,  $n^1$ , is pivoted in  $q$ , and serves to shape the shank, while the pattern,  $o^1$ , which is adjustable along the length of  $q$ , as well as outward from it, serves to form and shape the point.

Is there any mechanism found in the Pernot machine which produces either of these results, and if so, at what time do the proofs show that it was first attached? The curved or rounded shoulder to a needle made in this machine, is, doubtless, formed by the wedge,  $a$ , which operates to draw back the knife as it approaches the gripping chuck; and Pernot, in his examination, states that although he never pointed the needles in the practical use of his lathe, the mechanism was capable of such adjustment that the points could be readily turned.

We are then brought to the inquiry, whether the wedge,  $a$ , and the bar,  $b$ , were in the Pernot lathe prior to the Spring invention in 1857? The first witness upon this point is the complainants' expert, Hoadley. He considers the wedge,  $a$ , and the bar,  $b$ , an evident



after-thought, worked into the otherwise completed lathe at some time subsequent to its original completion and operation. This opinion is founded—*First*, upon the examination under a glass of the six needles, marked “Pernot needles, Ex. 14,” which had been exhibited by Pernot, in a former suit, as the product of his machine, and as proof that he had made upon the said machine needles with curved or rounded shoulders and sharp points, and which, the witness thought, gave unmistakable evidence of being finished by hand-tooling, both as to the shoulders and the points. And, *secondly*, upon the striking differences in the execution of the work on different parts of the lathe; “all parts,” says the witness, “being well formed, accurately fitted, and well finished, except the important bar, *b*, and its clamp-screws, *c c*. These are coarse, rude, and devoid of finish, and have all the characteristics of a subsequent addition and of a temporary makeshift.” And, *thirdly*, upon the conviction that the machine had been originally constructed for turning needles without points, and to a square shoulder, as shown by the presence of the diagonal set-screw, *R*, which could have no other purpose in connection with the organization of the lathe. He is strongly corroborated in all these particulars by the testimony of O. S. Hosmer and Edwin Strain, gentlemen of long experience in the manufacture of sewing-machine needles, and whose cautious methods of testifying have not failed to make a favorable impression upon the mind of the court.

But the most remarkable evidence in regard to the Pernot machine came out in the final examination of Alonzo Taylor and Joseph Bellows. These were first offered by the defendant as witnesses to prove the product of the lathe previous to the date of the Spring invention. Taylor, in testifying for the defendant, said that he first saw the Pernot machine in 1855, and that needles were produced by it with rounded or tapering shanks. But when he was afterwards recalled by the complainants he stated that his previous testimony had been given under a misapprehension of the matter in controversy; that he thought the suit had been brought for the infringement of a patent for a tapered shank needle, and not for a machine which could make one; that he always supposed that the tapering shanks of the needles made on the Pernot machine were turned and formed by hand-tooling; that when he first saw the machine, in 1855, it had neither the wedge, *a*, nor bar, *b*, nor any other device which could be used for forming a tapering shank or sharp point on the needle. He is confirmed by Bellows, who testifies to the alteration of and addition to the machine. He says that he went

into the employ of Pernot in the fall of 1855 or spring of 1856, and continued with him for several years; that he was his foreman in 1858, and was married on the seventeenth of June of that year, and that the wedge and bar were added to the machine after that date; that before these were attached Pernot made his needles by turning up to a square shoulder, and then filing them and grinding them down on an emery wheel.

Such testimony throws serious doubts upon the truth of the statement of Pernot and his brother-in-law, Davis, that as early as 1853 the former invented and used in connection with his lathe the mechanism needed to taper the shoulders and sharpen the points of needles produced by his machine. In view of the great commercial value of such a discovery in forming sewing-machine needles, it seems incredible that, after making the invention, he should so soon have abandoned it, and returned to the old and more imperfect and costly methods of producing them.

2. In consequence of such improbability, we have been led to carefully consider the evidence which induced the learned judges who decided the former suit to hold that the Pernot machine was in fact an anticipation of the Spring invention, and we are bound to say, although with great diffidence, that we question the correctness of their conclusions. Spring's patent claimed to be and is an organized mechanism, capable of completely shaping sewing-machine needles, throughout their entire length from point to hilt, at one operation. If Pernot's machine, under any of the proved circumstances of its organization and use, ever accomplished this, which we seriously doubt, it performed its work so imperfectly that the inventor laid no stress upon it, and preferred to sharpen his needles by hand, and soon laid aside the supplementary mechanism which had reference to the forming of a tapering shank. If it existed at all, its life was so fitful and uncertain that it must be put in the category of abandoned experiments; and such a failure ought not to be regarded as an anticipation of the invention of the Springs, who, it is conceded, were original inventors, and who, in our judgment, were the first inventors of a successful machine which was capable of turning the barrel, point, and curved shoulder of a sewing-machine needle at one continuous movement of the cutting tool.

It only remains to consider the question of infringement, in proving which the burden is upon the complainants. The evidence of infringement is slight. It rests mainly upon the testimony of John Armstrong, who commenced work with the inventors of the complain-

ants' machine in 1858; continued in their employ until 1862, then went to the war; came back to them in 1865, and remained with them until 1869, during which times he worked and became well acquainted with the Spring machine. He afterwards went into the employ of the defendant corporation in July, 1876, and remained there 10 months. While with them he saw in use by the defendant company machines operating to turn sewing-machine needles, having substantially the same parts or elements that he was familiar with, in the Spring machine, to-wit, a griping-chuck, which held one end of the wire, leaving the other end free to be operated upon, and the wire passing through the dies or rest, which was preceded by a knife that was governed by cams or a former.

In view of the decision of the supreme court in *Bennet v. Fowler*, 8 Wall. 445, this proof, if not rebutted, would seem to be sufficient. In that case the proof of infringement was that the defendant used machines substantially like the complainants, and the court held that if the defendant intended to contest the point he should have introduced proof to that effect.

Upon the whole case, we are of the opinion that a decree should be entered for the complainants

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P. LORILLARD & Co. v. DOHAN CARROLL & Co.

(Circuit Court, S. D. New York. November 2, 1881.)

1. LETTERS PATENT—PLUG TOBACCO.

Reissued letters patent No. 7,362, dated October 24, 1876, granted to Charles Siedler for an improvement in plug tobacco, consisting in a mode of making and identifying each separate plug of tobacco as being of a particular quality, origin, or manufacture, by tin labels or tags having any desired inscription on them, and prongs extending backwards from their edges, are not anticipated by English letters patent No. 1,516, dated April 30, 1874, granted to Gibson, Kennedy & Prior, nor void for want of novelty.

In Equity.

*Livingston Gifford*, for plaintiffs.

*Samuel S. Boyd*, for defendants.

WHEELER, D. J. This cause depends upon reissued letters patent No. 7,362, dated October 24, 1876, granted to Charles Siedler, upon the surrender of original letters patent No. 158,604, dated January 12, 1875, for an improvement in plug tobacco. Their validity is contested upon the grounds of want of patentable invention, want of novelty, and want of support of the reissue by the original. They

have been before the United States circuit court for the eastern district of Pennsylvania in *Lorillard v. McDowell*, 11 O. G. 640, where it was held, on a motion for a preliminary injunction, by *McKenna*, J., that the reissue was supported by the original, and was not void either for want of invention or novelty; and in *Lorillard v. Ridgway*, 16 O. G. 123, where it was held on final hearing, in view of the defences there interposed, by the same judge, that there was a lack of patentable invention and novelty. The question as to the reissue was the same there that it is here. The decision upon it in the former case was not disturbed by the change of opinion in the latter, and that decision is a sufficient authority for holding the same way here; and, besides, the reasoning upon which that conclusion was reached is fully concurred in. The same respect would be paid to the decision in the latter case upon the other questions if it had been made upon the same evidence, and it has not been claimed or urged in argument but what that case should be followed, unless this case is substantially different. The invention is of a mode of marking and identifying each separate plug of tobacco as being of a particular quality, origin, or manufacture, by tin labels, or tags, having the desired inscription upon them, and prongs extending backwards from their edges, pressed into the plugs in the last processes of manufacture, with their faces even with the surface of the plugs, where they would be held by the prongs and the surrounding tobacco. Among the things in evidence in that case as anticipations were English letters patent No. 1,516, dated April 30, 1874, granted to Gibson, Kennedy & Prior for an improvement in the manufacture of tobacco, and apparatus employed therein, the specifications of which were filed in the great-seal patent-office, October 27, 1874, which was before Siedler was then shown to have made his invention, and in those specifications was described as placing in each plug of tobacco, in the process of finishing at the surface, "a thin metal plate bearing the manufacturer's name, abode, trade-mark, or mark of quality." Now, Siedler's invention is shown to have been prior to the filing of that specification. This removes that patent from among the anticipations to be considered. *De Florez v. Reynolds*, 17 Blatchf. 436. This point is not disputed in behalf of the defendants. The use of these plates, or disk, was the most like Siedler's method of anything shown in that case. In view of that use it was well said that it was "difficult to see how the mere attachment of prongs to a flat disk, which had been used before, would involve a patentable exercise of inventiveness." That use being removed, the question is now materially

changed, and is to be decided upon the case as now presented. *U. S. Stamping Co. v. King*, 17 Blatchf. 55.

The anticipations now to be considered are screws, nails, coins, and other similar things pressed into the surface of the plugs at these stages of manufacture to identify some particular plugs to the manufacturers themselves, and not to go into the market with the plugs, to be observed by tradesmen or consumers; and initial letters and trade names impressed into some plugs of lots placed in the moulds at the same time by metallic letters placed loosely among the plugs within the moulds, or attached to the inner surface of the moulds, intended to mark the tobacco with those plugs for consumers; and there were tin labels almost exactly like Siedler's in use upon the corks of bottles. The coins and things of that sort would not accomplish the whole object sought by Siedler's invention. They would identify particular plugs through the processes of manufacture, and this is all they were used for, but would be of no use between manufacturers and customers or consumers. The letters were not labels, and could not be made to answer the place of labels on that substance. From the nature of the tobacco the letters must be large to be legible,—too large to have enough to answer the purpose of a label put upon the surface of single plugs; and they could not by the means used be put upon but few of the plugs, as they were subjected in a body to the final pressure. The tin labels from corks could not be placed upon the finished plugs tastefully and securely because the hard-pressed surface of the plugs would not receive and hold them. The object desired was to mark each plug so that the manufacturer or packer would be known by the mark on each plug throughout until it should reach the consumer, and to do this by such means that products of one could not be placed under the marks of another, and so as to leave the plugs symmetrical and tasteful to those who will use them. A label or tag was to be sought which would not be large enough to cover much of the surface, of such material that letters of a size small enough, so a sufficient number could be used might be put upon it, which could be fastened permanently enough to remain until the plugs reached the consumer, and which would be removable then and would not injuriously affect the quality of the tobacco. Siedler accomplished this by the tin label, which could be lettered, having prongs put into each plug in the last stages of manufacture and pressed into them, so that the shape of the plug would be preserved, the label could not be removed without dis-

figuring the plug, therefore one could not be exchanged for another, and it could be removed by the consumer when that part of the plug should be reached, and which would not affect the quality of the tobacco at all. This could not be wrought out from the means at hand before without thought and contrivance enough to warrant the decision of the patent-office that they constituted invention. No one had done this before him. Therefore, as the case now stands, the patent must be adjudged to be valid. With the reissue valid there is no question about infringement.

Let there be a decree for an injunction and an account according to the prayer of the bill, with costs.

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SAYLES, Ex'r, v. LOUISVILLE CITY R. Co.

(Circuit Court, D. Kentucky. November 15, 1881.)

1. LETTERS PATENT—EXTENDED TERM—STATUTE OF LIMITATION.

Where the statute of limitation provides that all actions shall be brought during the term for which the letters patent shall be granted or extended, or within six years after the expiration thereof, the lapse of six years after the expiration of the original term is a good defence to an action for the recovery of damages for the infringement of a patent-right during such term, though the term has been extended subsequently, and the statute has not yet run as to such extended term. The original term and the extended term are two distinct terms.

BARR, D. J. This is an action on the case to recover damages for an alleged infringement of a patent-right. The patent is for an "improvement in railroad car-brakes." This patent was issued July 6, 1852, and was reissued and extended July 6, 1866, for the term of seven years. The plaintiff alleges that the defendant used this patent car-brake from July 6, 1864, until the expiration of the extended term—July 6, 1873. The defendant pleads the lapse of five years, and relies upon the Kentucky statute of limitation in bar of the action. The plaintiff demurred to this plea, and the defendant has amended his plea by pleading the lapse of six years after the expiration of the original term of the patent, and relying upon the statute of limitation passed by congress and approved July 8, 1870.

The parties have agreed to the facts, and the only question for the court to decide is the applicability of the statute of limitation. The Kentucky statute of limitation does not apply to this case; because, if for no other reason, an act of congress has prescribed the limita-

tion in such actions. The Revised Statutes, § 721, using the language of the act of 1789, provides that "the laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

The state law is, therefore, not the rule of decision where an act of congress has provided the rule. Whether, if there were no national statute of limitation applicable to the case, the state statute would be a bar, does not arise and is not decided. The fifty-fifth section of the act of congress, approved July 8, 1870, provides that "all actions shall be brought during the term for which the letters patent shall be granted or extended, or within six years after the expiration thereof." This was omitted from the Revised Statutes, and is therefore repealed; but section 5599 provides that "all acts of limitation \* \* \* embraced in said revision and covered by said repeal shall not be affected thereby, but all suits \* \* \* for causes arising, or acts done or committed, prior to said repeal may be commenced and prosecuted within the same time as if said repeal had not been made."

This suit was brought June 18, 1879, within the six years after the expiration of the extended term, and plaintiff's counsel insist that when the term was extended the extension had the same effect in law as though the patent had been originally granted for 21 years, and the plaintiff may recover for the infringement of the patent during the original term as well as the extended term. He reads the act as if the words had been, "all actions shall be brought during the term of the monopoly, or within six years after the expiration thereof." If, however, the statute had been intended to mean that there is in law but one term—whether that term should be 14 or 21 years—it would have been only necessary to omit the words "or extended," and then the act would have read, "all actions shall be brought during the term for which the letters patent shall be granted, or within six years after the expiration thereof."

The subsequent section, which provided that when an extension was granted that "thereupon the said patent shall have the same effect in law as though it had been originally granted for 21 years," would, perhaps, have applied, and made an extended term a part of the original term, and might, under this theory, been construed as

one term in the meaning of the act. If, however, we are to give any effect to the words "or extended," in this enactment, it must be that the term for which the letters patent shall be granted originally, and the term for which the letters patent is extended, are two distinct terms. Instead of construing this clause as if it read "all actions shall be brought during the term of the monopoly, or within six years after the expiration thereof," it should be construed as if it read, "all actions shall be brought during the term for which letters patent shall be granted, or during the term for which letters patent shall be extended, or within six years after the expiration thereof;" "thereof" referring to the original or extended term, as the case may be.

It is not true that letters patent run for only one term when the patent is extended. In such a case there are two terms,—the original term and the extended term,—and, though the law provides that when a patent is extended it shall have the same effect in law as though it had been originally granted for 21 years, that does not change this fact, nor does it change the fact that the original term was for 14 years, and not 21 years. The act does not provide that the two terms shall be considered as one term in law, but simply provides that the extension of a patent shall have the *same effect* in law as though it had been originally granted for 21 years. I think congress has, in the clause under consideration, clearly recognized that an extended term and the original term of letters patent are distinct terms.

An extended term of letters patent can have the same effect in law as though it had been granted for 21 years, in the granting of a monopoly, without extending the time of the bar of the statute of limitation on existing causes of action. The patent right is quite distinct from the causes of action which a patentee may have for its infringement, and because a patent right may be extended it does not follow that the time within which such causes of action should be brought should also be extended. If we are not correct in our construction of this act, then congress has given the commissioner of patents the power to extend, in his discretion, the time in which the statute of limitation bars existing causes of action. This would be an extraordinary delegation of authority, and one which the courts should hesitate to recognize unless the legislative will was clearly expressed.

There is some conflict in the decision as to the proper construction of this clause of the act of 1870, but the weight of authority sustains



the construction now given. See *Sayles v. L. S. & M. S. R. Co.*, Justice Harlan, MS. op.;\* *Sayles v. D. & S. C. R. Co.*, Judges Dillon & Love, MS. op. *contra*;† Judge Hughes, 3 Hughes, 172.

I therefore consider that the six years' limitation, as pleaded, is a bar to plaintiff's recovery of damages for the infringement of the original term of his patent, and that he can only recover damages for his extended term—from July, 1866, to July, 1873. Let judgment go for \$393, which is the sum agreed upon by the parties if the plea of the statute was sustained as to the original term of the patent.

\**SAYLES v. LAKE SHORE & MICHIGAN SOUTHERN RY. CO.*

*SAME v. CHICAGO & NORTHWESTERN RY. CO.*

*SAME v. CHICAGO, BURLINGTON & QUINCY RY. CO.*

(*Circuit Court, N. D. Illinois.* October Term, 1879.)

In Chancery.

EXTRACT OF DECISION OF JUSTICE HARLAN ON DEMURRER TO BILL.

The third ground of demurrer is a question of limitation under the act of 1870. The act of 1870 contains this short provision: "All actions shall be brought during the term for which the letters patent shall be granted or extended, or within six years after the expiration thereof."

I am not referred by counsel on either side to any adjudication bearing directly upon the question. It is a question within a very small and narrow compass, and must be determined by a fair and reasonable construction of the language. I have reached a conclusion entirely satisfactory to my own mind, and I think that statute means that where the party sues for any infringement under the original term, he must bring his action within six years after the expiration of that term; and when he sues for anything that has occurred under the extended term, he must sue within six years after the expiration of that extension; and that the statute does not mean, as contended for by the learned counsel for the complainant, that the party has the right to sue for an infringement, either under the original or extended term, within six years after the expiration of the extended term, and thus bring the suit within 27 years. I do not think that was the purpose of congress, and I therefore sustain the grounds of demurrer as to all causes of action.

Mr. Walker, interrupting the court in the delivery of its opinion, said:

"In the case of *Sloan v. Watterson* the supreme court of the United States, in an opinion delivered by Mr. Justice Bradley, held that statutes of limitation began to run as to rights of action that accrued prior to their passage, not at the time they accrued, but at the time the act was passed; so that, inasmuch as this statute of limitations was enacted in July, 1870, the case of *Sloan v. Watterson* will cause your honor to conclude, I think, that we had six years from the time it was enacted in which to bring our suits, and inasmuch as we brought our suits within six years from the time it was enacted, these suits, even as far as they refer to the rights of action under the first term, are not

barred. I did not make that point in the argument, for the simple reason that I desired to secure from your honor an expression on the subject for the benefit of the profession at large."

*The Court*—"Counsel has my opinion upon the showing as it was made, and, if there is any other view to be presented, I will hear him upon a petition for rehearing; but at present I should adhere to that opinion."

Now, one of the grounds of demurrer also is that for any time prior to July 7, 1865, the plaintiffs are barred by reason or by force of the statute of Illinois of February 4, 1849. I confess that as I thought about that question I could not understand logically why the provision of the state statute did not apply if there were no statute of the United States; but the weight of authority is the other way, and I think my business here holding this court is to be governed by the weight of authority. Purely upon the weight of authority, therefore, I overrule that view, and hold that the state statute of limitations has no application.

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†SAYLES v. DUBUQUE & SIOUX CITY R. CO.

(Circuit Court, D. Iowa. In Chancery.)

PER CURIAM, (DILLON AND LOVE, JJ., *concurring*.) We have considered the points made in argument upon the demurrer to the bill. We have no time to elaborate our views. It must suffice to state our conclusions. We do this at this time so that the cause may proceed. These conclusions are not on all the points so fixed as to preclude further argument and consideration on the final hearing. The views which we now entertain of the questions made are as follows: \* \* \*

*Fourth.* As to the statute of limitations. We are of opinion that the state statute of limitation has no application to suits in respect of the rights granted by letters patent for inventions. This bill was brought in February, 1877. The original term expired July 6, 1866; the extended term, July 6, 1873. The act of congress of 1870, section 55, prescribed that "all actions shall be brought during the term for which the letters patent shall be granted or extended, or six years after the expiration thereof." This limitation continued in force until the first day of December, 1873, when the Revised Statutes took effect, repealing it. Since the original and extended term of a patent may be and often is held by different persons, and since the language of the limitation statute of 1870 is ambiguous,—in view of the injustice to defendants of requiring them to account for profits made any time since the date of the original patent in 1852, a period of 25 years, where the proofs may be lost,—we are of opinion that their right is barred to recover for profits or damages during the original term. An inquiry of profits or gains within a period of five years is difficult, as the profits gained depend upon many conditions. When we come to carry such an investigation back for almost a quarter of a century, accuracy of results is almost impossible, and the laches of a patentee coming forward at such a late date does not give him a very favorable position in a court of equity. What is the proper rule to measure compensation in a court of equity is a question not arising on the demurrer, and it is not implied from the above use of the words "profits and gains."

IRWIN and another v. METROPOLITAN TELEPHONE & TELEGRAPH Co.  
and another.

(Circuit Court, S. D. New York. October 21, 1881.)

1. LETTERS PATENT.

Neither claims 1 and 2 of letters patent No. 209,266, nor claim 3 of letters patent No. 225,388 are infringed by the defendant's instrument.

*F. H. Betts*, for plaintiffs.

*C. Smith and J. J. Storrow*, for defendants.

BLATCHFORD, C. J. I think the proper and necessary construction of claims 1 and 2, of No. 209,266, is that the normal pressure of the electrodes must be obtained by means of gravity, counteracted partly by a delicate retractile spring, elastic in the direction opposed to gravity. The spring must suspend the needle against the force of gravity. The defendants' instrument does not employ gravity to secure pressure, nor a spring to modify the force of gravity, but it obtains the normal pressure of the electrodes by the direct strain of a flat spring. As to No. 225,388, there is no infringement of claim 3. The vibrating disk of the defendants does not have free edges, and is not capable of vibrating bodily, in the sense of the patent. In consequence of being held by the spring and the clamp, it bends, and some parts between the center and the edge move more than others.

The bill will be dismissed, with costs, when the case is disposed of as to the Bell Company.

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THORSON and another v. PETERSON and others.

(District Court, N. D. Illinois. November 26, 1881.)

1. EVIDENCE.

Courts will take judicial notice of the boundaries of the different states.

2. CONTRACTS OF SEAMEN.

Seamen's contracts to ship on a sailing-vessel for the voyage are terminable at the will of the parties, on her arrival at a port of safety, by the dismasting of the vessel in a collision.

In Admiralty.

*W. H. Condon*, for libellants.

*C. E. Kremer*, for respondents.

BLODGETT, D. J., (*orally*.) This is a libel for wages, and charges that on the seventeenth of November, 1880, libellants shipped on the schooner Winnie Wing, of which respondents were owners, and the

respondent Peterson was also captain,—Thorson as mate and Oleson as seaman,—for a voyage from Chicago to Pentwater, Michigan, and return; that the schooner sailed on her voyage the day libellants were employed, but during the morning of the next day she had a collision with another vessel, was dismasted, and rendered incapable of proceeding on her voyage, and, on the afternoon of the eighteenth of November, was towed into South Haven harbor, where she remained about 10 days, when she was towed to Pentwater, her port of destination, where she arrived on the thirtieth of November. The defence set up is that both the libellants were shipped for the round trip, at a gross sum of \$20 each, and that on the arrival of the schooner at Pentwater they refused to assist in unloading the schooner, although the master, in view of the fact that the schooner, by reason of the accident to her, was unable to return to Chicago that fall, offered to pay the full wages for the round trip and libellants' expenses back to Chicago, which they refused to receive. And respondents aver that since said offer they have always been ready and willing, and are still ready and willing and able, to pay the amount so offered, which they insist is the full amount to which the libellants are entitled.

The proof in this case shows to my satisfaction that Thorson was not employed at a gross sum for the round trip, but was employed by the day, at the rate of \$3.50 per day. It appears from the evidence that for two or three trips made by this schooner, preceding the Pentwater voyage, Thorson had been employed as mate, at \$3.50 per day, and that on her return from the last trip, preceding the Pentwater trip, he did not leave the schooner, but remained on board of her and assisted in taking on a cargo of grain for Pentwater; and in the absence of controlling proof of a new contract for the Pentwater voyage, I must find that he was continued for the Pentwater voyage in the same capacity and on the same terms on which he had been employed in former voyages.

As to Oleson, the evidence is undisputed that he was employed for the round trip for the sum of \$20; but after the vessel arrived in South Haven he insisted upon leaving, saying that he wished to go to Chicago and ship on some vessel bound for Buffalo, whereby he would get large wages and have employment for the rest of the season of navigation. The captain refused to allow him to leave, and told him that if he would remain on board until the vessel was safe in Pentwater he would "do what was right by him," and Oleson accordingly remained on board and did duty until the vessel arrived in Pentwater. Thorson remained on the schooner during the time she lay in South Haven

harbor and until her arrival in Pentwater, doing duty as mate all the time she was in South Haven harbor, and he had full charge of the vessel part of the time, because the captain was absent looking for a tug.

On the arrival of the vessel at Pentwater, the captain announced to Thorson and Oleson that he intended to pay them the sum of \$20 each, and \$7 extra, which would pay their fare to Chicago, and that he considered them both as employed by the round trip, and that they were bound by their obligation to remain on board until the vessel was unloaded; and that he would only pay them what he proposed to pay on condition that they did so remain on board and assist in unloading. On this announcement both libellants left, and the captain refused to pay them any wages or advance them any money on account of their services.

The libellants further claim that the master of the vessel, having employed them without shipping articles, is liable, under sections 4520 and 4521 of the Revised Statutes of the United States, to pay them the highest wages which shall have been given for the preceding three months at the port of shipment, and insist that the proof shows such wages to be four dollars per day for seamen, and four dollars and twenty-five cents per day for mates, and that, therefore, they are entitled to recover wages at these rates. But this statute is only applicable to voyages from a port in one state to a port "in any other than an adjoining state," and, as this court is bound to take notice of the legally-established boundaries of the different states, it must be held that Illinois and Michigan are "adjoining states" within the meaning of this statute. The boundary line is the middle of Lake Michigan, and the process of this court, for instance, or an Illinois state court, could, undoubtedly, be executed on the lake anywhere west of this boundary line. The mere fact that the boundary line is upon the water, and therefore, perhaps, difficult to determine by physical boundaries, or lines palpable to the eye, does not change the operation of the statute in this respect. So that these seamen cannot either of them, I think, invoke this statute in aid of their case, and recover larger wages on the ground that the master hired them without shipping articles.

As I have already said, there is no doubt that Oleson shipped for the round trip from Chicago to Pentwater and return at the gross sum of \$20. But I am satisfied that by the dismasting of the schooner the voyage was broken up, and the seamen who had shipped for the voyage were at liberty to leave as soon as the vessel was in a

port of safety, the contract for the voyage being terminated by the inter position of the *vis major*. *The Dawn*, 2 Ware, 126; *Miller v. Kelly*, Abb. Adm. 564; 3 Kent, 196. Being dismasted she could no longer, as a sailing vessel, continue and complete her voyage, and did not attempt to do so, but was subsequently taken to her port of destination by the assistance of a tug.

This breaking up of the voyage by disaster was one of the contingencies of the employment which I must presume to have been contemplated by both parties at the time the contract was made. After the schooner was in a port of safety, and it had become practically impossible to complete the contract, and both parties were by the disaster absolved from it, Oleson had, in my opinion, no right to claim that any wages had been earned upon the original hiring, because the original contract was an entirety; but he could, as I have already said, if he chose, leave the vessel at that time. Indeed, I am not sure but that if he remained on board after the vessel arrived at South Haven, with the knowledge and acquiescence of the master, the law would imply a new hiring under the new circumstances which surrounded both parties. But without passing directly upon the question as to whether the law would or would not imply a new hiring, it is sufficient to say that the proof satisfies me in this case that there was a new employment of Oleson by the master. The promise was that if he would remain on board he would do what was right by him, which implied that he would pay him such wages as his services were reasonably worth. He did remain on board and perform his duty until the vessel arrived at Pentwater, and only left when the captain denied his obligation under any new hiring, and insisted that the men were bound by the contract made in Chicago before the sailing of the schooner.

I have no doubt that, when the captain repudiated the contract made, the libellants had the right to leave the vessel and sue for and recover in this action whatever was then due them. The conduct of the captain towards these men does not seem to me to indicate that he was willing or intended to do what was right with them under the circumstances. There is no proof that he could not have obtained a tug immediately after the vessel took shelter in South Haven harbor; but it is evident that he took his own time to make the best bargain he could with a tug after the season had nearly or substantially closed, so as to get his vessel towed to Pentwater at the lowest possible price, and during all this time he kept these men on his vessel when they could have been earning higher wages than he finally

proposed to pay them, and, undoubtedly, under an implied if not an express promise that he would pay them full wages.

There was no treaty or contract with Thorson in regard to the amount of his wages for this special voyage, and I must, therefore, assume that he can only claim the rate of wages of his former voyages, which was \$3.50 per day. The proof would satisfy me that Oleson's wages were fairly worth \$3.50 per day also, but the commissioner, after a review of all the testimony, has come to the conclusion that his wages should be \$3.33, and I am not disposed to disturb that finding, as it seems to have been arrived at after a very careful analysis of all the testimony in the case bearing upon the question.

There will, therefore, be a decree in favor of Thorson at \$3.50 per day from the seventeenth of November to the first day of December, and for Oleson at \$3.33 per day from the nineteenth of November to the first of December.

The master also found that, under the promise to do what was right with Oleson, the captain was bound to pay his fare, which amounted to \$7 from Pentwater to Chicago, and with this finding I can find no fault under the facts in the case. I do not see, however, from the proof that Thorson was entitled to be returned to Chicago at the expense of the vessel.

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### THE GUIDING STAR.\*

(*District Court, S. D. Ohio, W. D. December, 1881.*)

#### 1. MARITIME CONTRACTS—INSURANCE—MORTGAGE—CONSTRUCTION CLAIMS—PRIORITY OF LIENS—BORROWED MONEY—LIENS UNDER STATE LAW—HOMESTEAD.

Where a boat was seized on a libel for home supplies, and claims against her were filed for foreign and home supplies and repairs, for insurance premiums, for material and labor furnished in the construction of the boat, for a mortgage, and for borrowed money, and the boat was sold; on distribution of the proceeds—

*Held*, (1) That a contract to pay premiums on marine insurance is a maritime contract.

(2) That a mortgage on a boat is not a maritime contract, and must be postponed to (a) claims for seamen's wages, and foreign supplies and repairs; (b) claims for supplies, repairs, and insurance furnished in the home part of the boat, for which the state law gives a lien, whether the same be furnished before or after the recording of the mortgage; (c) construction claims for which, by the state law, a lien existed prior to the recording of the mortgage.

\*Reported by J. C. Harper, Esq., of the Cincinnati bar.

(3) That construction claims are not maritime contracts, and the liens given therefor by the state law must be postponed to liens on maritime contracts, which attach by either the general admiralty law or by the law of the state. A state law cannot confer jurisdiction on a court of admiralty by attaching a lien to a non-maritime contract. Admiralty will enforce only such state liens as are given on maritime contracts.

(4) That the claim of the owner of the boat, for an allowance in lieu of a homestead, cannot prevail against liens by either the admiralty law or state statute.

(5) That the lien given by section 5580, Rev. St. of Ohio, is a lien created by the express terms of the statute, and requires for its perfection none of the proceedings provided in case of mechanics' liens.

(6) That borrowed money is to be placed on the same footing as the purpose for which it was borrowed. Where the latter is of a maritime character, and has a lien attached thereto, whether by the general or the local law, the money advanced to meet it has a lien of equal dignity.

(7) That in the distribution of the fund now in court such claims as are maritime in their nature and subject-matter, and for which the state law gives a lien, including insurance, supplies and repairs furnished in the home port are placed on an equality with the liens given by the general admiralty law for foreign supplies and repairs.

Following *Baxter, C. J.*, in *The General Burnside*, 3 FED. REP. 232.

(8) That after paying the costs in this case the fund shall be distributed as follows: (1) Seamen's wages; (2) foreign and home supplies, repairs, insurance; (3) building claims; (4) mortgage claims; (5) claims for borrowed money to which no liens attach.

### In Admiralty.

The facts in this case, briefly stated, are as follows: The steamboat Guiding Star was built in the summer of 1878 at the port of Cincinnati, entirely on credit, by Capt. W. B. Miller, who continued to be her sole owner and master up to the date of her seizure, in June, 1881. The claims filed against her are as follows: For foreign supplies and repairs, \$17,393.33; for home supplies and repairs, \$14,113.63; for insurance premiums, \$3,080; for construction claims, \$14,684.95; mortgage, \$5,000; borrowed money, \$22,380.64; allowance in lieu of a homestead, \$500. The borrowed money is classifiable as follows: \$229 to pay seamen's wages; \$11,020.71 advanced towards building the boat; and \$11,051.93 to meet the general indebtedness of the boat as the same accrued, including supplies, wages, insurance premiums, and payments on notes given for the building of the boat. All the notes, including those given on construction claims, were drawn up in the name of the boat and her owner. No dispute whatever existed as to the correctness of any of the claims. The total indebtedness of the boat at the time of her seizure was \$76,652.52. The sum realized on her sale was \$38,310, and the real question for the court to decide was, how should the fund be distributed?

*Moulton, Johnson & Levy* and *W. H. Jones*, for libellants and sundry intervenors.

*Lincoln, Stevens & Slattery, Perry & Jenny, C. K. Shunk, Follett, Heyman & Dawson*, and *Yaple, Moos & Pattison*, for other intervenors.



SWING, D. J. This case has been ably and elaborately presented to the court by counsel, both by oral arguments and in briefs. It involves the distribution of a fund amounting to nearly \$40,000, now in the registry of the court, being the proceeds of the sale of the steamer Guiding Star. About 70 libels and intervenors have been filed, embracing such a variety of claims as to cover almost the entire domain of admiralty, so far as the question of liens and their priorities is concerned.

As to what are the facts in the case there is but little if any doubt, excepting on one point, and that is, the circumstances under which the various loans to Capt. Miller, the owner and master of the boat, were made. Aside from the loans obtained for the building of the boat, the other advances consist of two classes; namely, those obtained at the home port here in Cincinnati, and those obtained in ports outside of this state. It is well established that where money is advanced to meet such claims as in themselves have liens according to the rules of admiralty, a lien also exists for such money. But before a lien exists for money advanced, it must be clearly shown that the purposes for which it is advanced are entitled to a lien. If advanced for the purpose of paying seamen's wages, necessary supplies and repairs, or anything else to which a lien in admiralty attaches, in that case a lien also attaches to such money, but not otherwise.

Now let us see what are the facts in this case so far as the borrowed money is concerned. With but one exception, and that is the loan made by Mr. Menge, of New Orleans, the money was obtained for what Capt. Miller calls "the general purposes of the boat," and he is careful to say that such general purposes include supplies, repairs, interest, take-up notes, etc. Now, some of these purposes have a lien attached to them and some have not, and if it could be definitely shown what portion of each loan was borrowed for such purposes as have liens, then the court would place such portions on the same footing with supplies. *The Grapeshot*, 9 Wall. 144. The testimony, however, shows very clearly that this cannot be done. In the case of Menge's loan, however, notwithstanding one or two general expressions on Capt. Miller's part, I am inclined to think that the advance of \$1,000 was made for the express purpose of paying the running expenses of the boat, strictly so called, and therefore decide that a lien attaches to that loan.

Upon the disputed questions which the order of payment determines,

they first arise upon the question whether the claims for insurance should be included as one of the contracts of a maritime character for which state law gives a lien. That the contract of insurance is a maritime contract is settled by the decision of the supreme court in the case of *Ins. Co. v. Dunham*, 11 Wall. 1.

2. Whether the claim for materials and labor in the building of a boat is a maritime contract. That such a claim is not a maritime contract is also settled by the decision of the supreme court in *Edwards v. Elliot*, 21 Wall. 532, and the authorities there cited.

3. The mortgage must be postponed to the lien given by the general admiralty law for supplies and repairs. *The Emily Souder*, 17 Wall. 666. Now, if the lien created by the statute of the state for these claims, when furnished in the home port, is of equal dignity with liens given by the general admiralty law, it follows that the mortgage must be postponed to them also. Aside from this reasoning the weight of authority would seem in favor of the priority of liens for home supplies to that of a mortgage. *The William T. Graves*, 8 Ben. 568; *The Favorite*, 3 Sawy. 405; *The St. Joseph*, Brown, Adm. 202; *The Bradish Johnson*, 10 Chi. Leg. N. 353; *The Kiarsage*, 2 Cur. 421; *The Granite State*, 1 Spr. 277.

4. The mortgage must be postponed to the lien given by the state statute for materials and labor in the building of the boat. This lien existed when the mortgage was given, and the latter must therefore be subject to it. *Jones v. The Commerce*, 14 Ohio, 409; *Provost v. Wilcox*, 17 Ohio, 359; *Johnson v. Ward*, 27 Ohio St. 520; *Steamer Monarch v. Marine Ry. Co.* 7 Ohio St. 478.

5. The mortgage not being an admiralty contract, nor having an admiralty lien, can only be treated as a legal lien. *Bogart v. Steamboat John Jay*, 17 How. 399; *The Emily Souder*, 17 Wall. 666; *The Lottawanna*, 21 Wall. 558.

6. The claim on the part of the owner of the boat for an allowance of \$500 in lieu of a homestead cannot prevail against liens which exist by virtue of the general admiralty law, nor against those created by the state statute. *Johnson v. Ward*, 27 Ohio St. 520.

7. The lien given by section 5880 of the Laws of Ohio is a lien created by the express terms of the statute, and requires for its perfection none of the proceedings as provided for in the mechanics' lien law of the state. *Johnson v. Ward*, *supra*.

8. In reply to the proposition that as the state statute, which creates liens, makes no distinction between liens upon contracts which

are admiralty and maritime in their nature and subject-matter, and those which are not, therefore we, in taking jurisdiction of them, cannot do so, we have this to say: Our jurisdiction, by the constitution and laws of congress, extends to those cases only which are maritime in their character, and it is not in the power of a state legislature to enlarge this jurisdiction. The proceeding in this case is a proceeding *in rem* in admiralty, and by the twelfth rule the right to such proceeding or process is limited to "material-men, for supplies or repairs, or other necessities;" and we can enforce in this court such state liens only as are given upon contracts which are maritime in their nature and subject-matter.\* Besides, we are not disposed to extend the decision of the circuit judge so as to include liens by state statutes upon contracts which are non-maritime in their character. *The Lottawanna*, 21 Wall. 558.

9. As already referred to at the commencement of this decision, by the general admiralty law a lien exists in favor of one who advances money for the payment of supplies and repairs. *The Grapeshot*, 9 Wall. 130; *The Lulu*, 10 Wall. 192; *The Emily Souder*, 17 Wall. 666; *Ins. Co. v. Baring*, 20 Wall. 159. If the evidence in this case reasonably satisfied my mind that the claims for money in this case, in the foreign and home ports, were advances made for the payment of supplies and repairs, I would certainly declare a lien in favor of such advances, or, if it were shown that any definite part of it was for that purpose, then a lien would be declared to the extent of such part. *The Grapeshot*, 9 Wall. 129. But, in my opinion, after a careful examination, the testimony fails to show that any definite portion of the money loaned was advanced for the payment of supplies and repairs. None of those who loaned money in the home port have been examined as witnesses, and the only testimony we have upon their claims is that of Capt. Miller.

Without entering into a further discussion of the principles involved in this case, or of the rules as established by the courts of admiralty, we will merely state, in conclusion, the classes into which the claims should be divided in the order of their priority of rank:

(1) Seamen's wages. (2) All claims which by the general admiralty law have a lien, as for supplies (including fuel) and repairs in a foreign port. (3) Such claims as are maritime in their nature and subject-matter, for which the state law has given a lien, including supplies, repairs, and insurance. These having, by the decision of the circuit judge of this circuit in the case of *The General Burnside*, 3 FED. REP. 232, been held to be of equal dignity

\*See *The Schooner Marion*, 1 Story, 73; *Read v. Hull of New Brig*, 1d. 246; *The Ship Norway*, 3 Ben. 165.—[REP.]

with liens created by the general admiralty law, must be treated as composing a part of the second class of claims. (4) Claims for materials and labor in the building of the boat. (5) Mortgage claims. (6) Claims for borrowed money for those purposes to which no liens attach in admiralty.

### THE MECHANIC.\*

### THE FREE STATE.\*

(District Court, E. D. Pennsylvania. November 9, 1881.)

#### 1. ADMIRALTY—TUG AND TOW—TEMPORARY ABSENCE OF TUG—MOORING OF TOW—EXTRAORDINARY STORM.

A tow of canal barges was left by the tugs having them in charge in an apparently safe harbor, moored to a wharf and floating platform, the tugs proceeding in search of another tow whose arrival was expected. During the absence of the tugs an extraordinary storm arose, and the barges were swept away. Their owners claimed that the loss was due to the absence of the tugs, and the defective condition of the platform to which the tow was moored. *Held*, that the temporary absence of the tugs, in pursuance of uniform custom, did not constitute negligence. *Held, further*, that the evidence failed to sustain the allegation that the loss was due to defects in the platform.

*Libel in personam* by the owners of two canal barges against the owners of two tugs, to recover damages for injuries to the barges alleged to have been caused by the negligence of the tugs. The facts were as follows:

On October 4, 1877, the barges *Mechanic* and *Free State*, loaded with coal, were, with other barges, taken in tow by the tugs *Sherman* and *Sawtelle*, belonging to respondents, at Fairmount dam, on the river Schuylkill, for a voyage to Bordentown, New Jersey. About 6 o'clock p. m. they reached a point on the Schuylkill below Gray's ferry bridge, and were there moored to a wharf and floating platform of logs, leased by respondents, and used for mooring boats. The platform consisted of logs running from the wharf up the river parallel with the bank, joined together by transverse boards, and fastened to the wharf and to trees on the bank. On the inner log were cleats used for fastening boats by their hawsers. The tow, consisting of five tiers of four barges each, and one tier of three barges, was made fast to this platform by lines from the inside boats to these cleats. The two tugs left the tow after it had been moored and proceeded down the river to meet an expected incoming tow. Not meeting this tow, the tugs turned back, but before reaching their own tow put in and moored at another landing. During the evening an extraordinary storm arose, accompanied by a freshet; the tow was swept from its moorings, and the *Mechanic* and *Free State* sunk. About the time the barges were set adrift the tugs came to their assistance, but were unable to save them, and were themselves driven ashore. Libellants' testimony was

\*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

to the effect that the tugs could safely have returned to the tow before the storm reached its height; that the cleats on the platform were insufficient, defective, and rotten; and that the breaking of these cleats caused the loss. Respondents' testimony was to the effect that the violence of the storm was such as to prevent the tugs from immediately returning to the tow; that the cleats were properly constructed and in good condition, and had been recently inspected; and that the loss was due to the extraordinary violence of the storm.

*Edward F. Pugh*, for libellants.

*Alfred Driver, Henry R. Edmunds, and J. Warren Coulston*, for respondents.

BUTLER, D. J. The storm and flood in which the boats were lost are, of themselves, quite sufficient to account for the disaster. The loss must, therefore, be assigned to this cause, alone, unless contributory negligence be shown. The libellants charge such negligence, and specify three distinct instances in which they say it existed: *First*, in making up the tow; *second*, in being absent from it when danger threatened; and, *third*, in mooring the tow to a float in imperfect condition. The burden of proof is on the libellants.

I find nothing to justify the first specification; the tow was made up according to common usage. This point, indeed, was virtually abandoned on the argument. Nor do I find anything to justify the second specification. The boats were securely moored in a safe harbor,—where no danger had ever been experienced, and where, therefore, none could reasonably be expected. The respondents, having occasion to be temporarily absent, left the tow, in pursuance of uniform custom. When the storm came, or increased in violence, and the water rose, so as to create apprehension of danger, it was their duty to return, and make all proper efforts to save the boats. The evidence, however, justifies a belief that to return at this time was virtually impracticable. The suddenness and violence of the storm, and the darkness of the night, rendered such an effort unnecessarily hazardous, if not futile. Although the evidence is not harmonious, its preponderating weight sustains this view. I am by no means satisfied, however, that the respondents' absence contributed to the disaster. It seems quite probable that the result would have been the same if they had been present. The libellants, who were on the boats, saw no cause of alarm until the crisis was imminent, when nothing effective could be done. An increase of attachments to the float would probably have been useless. If the attachments had held fast it is reasonable to believe—(as the libellants' witness Malloy asserts) that the force of the wind, and current in the river,

would have swept the float, and everything connected with it, away. That a few boats remained fast, does not tend to prove that the entire tow might thus have been saved. The enormous strain of so many loaded boats, under the force of the storm and flood, must have been virtually irresistible. Nor is it probable the tugs could have held them, or rendered any essential aid, by taking the hawsers. The attempt made by this means, directly after the attachments to the float gave way, failed. The tugs could do little more than save themselves.

As respects the third specification, (principally relied upon by the libellants,) the witnesses who speak directly to the point are in serious conflict,—those called by the libellants saying that the logs and cleats were rotten and unsafe, and those called by the respondents saying they were sound and secure. Viewed in the light of this direct testimony alone, the fact would be in doubt. Considering the opportunity of the several witnesses to see and judge, it could not be said that the weight of evidence is with the libellants. Viewed in the light of surrounding circumstances, also,—the overhauling of the float some months before the accident, and the slight repairs required after this event, and the more significant fact that the tow was held for a considerable time under great pressure, and broke away only when the storm and flood had reached their height,—the decided weight of the evidence seems to be with the respondents.

No debatable question of law is involved in the case. The respondents were bound to the observance of such vigilance and care as the safety of the boats called for, under existing circumstances. They could not anticipate such a contingency as arose, and were not, therefore, required to prepare for it. It was not only extraordinary, but, so far as the witnesses know, unprecedented. Under ordinary circumstances,—in such weather as the respondents were justified in expecting,—the boats would have been entirely secure. When the extraordinary emergency arose no adequate provision for it was practicable.

Unfortunate as the libellants have been, they have no just claim on the respondents for compensation. The libels must, therefore, be dismissed, with costs.

## UNION INS Co. v. GLOVER and another.

*(Circuit Court, D. Maine. September, 1881.)***1. EQUITABLE ASSIGNMENTS—BILL OF INTERPLEADER.**

An assignment of a part only of a particular fund is valid in equity.

After a loss occurred, the holder of a policy of insurance gave an order on the company for a specific sum, which was less than the total amount of the policy and less also than the amount due from the company to the assured on this loss. The party named in the order brought an action against the company in a state court in the name of the assured, and the assured subsequently brought a similar suit in this court. While both actions were pending, the insurance company filed a bill of interpleader against the parties to these suits, to have their rights as to the amount due on the policy ascertained. *Held*, that the court can determine the rights of the parties; and, further, that the order constituted an equitable assignment of the amount named in it.

In Equity.

*A. P. Gould*, for E. K. Glover.

*A. A. Strout and W. Gilbert*, for C. C. Glover.

*F. A. Wilson*, for the Insurance Company.

Fox, D. J. On the twentieth day of April, 1878, the complainant, by policy No. 6,305, insured the sum of \$2,500 on brig J. M. Wiswell for one year; loss payable to C. C. Glover, who was the master and owner of nine-sixteenths of the brig.

Within the year the vessel met with disaster in the English channel, and, for the benefit of all concerned, was beached near Dartmouth. She was subsequently taken to that port and there sold. Controversies in relation to the general average arose between the master and the owners of her cargo, which are, it is stated, still pending in the courts of England. In May, 1879, C. C. Glover returned to Rockland, in this state, where his brothers, E. K. and W. H. Glover reside, each of whom owned one-eighth of said brig. In July, Charles was desirous of obtaining funds with which to return to England, as he claimed, to pay bills there incurred about the general average claims. He applied to his brothers to advance him \$1,000 on that account. William had always refused to join in the prosecution of the general average claims, and declined to advance funds for that purpose, but was willing to loan Charles \$1,000, on receiving as security for its payment an assignment from Charles of the policy of insurance. Such an instrument was drawn in the usual form, July 7th, and a power of attorney was given by Charles to E. K. on the same day, authorizing him to collect the insurance from the company. Charles afterwards refused to execute the assignment of the policy to William, and William declined to loan him the \$1,000.

On the ninth day of July, Charles received from E. K. Glover \$600, which  
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had been obtained from a bank in Rockland on the note of Charles, payable to and indorsed by William H., E. K. having previously indorsed it, whereby, by the decisions in Maine, he became a joint promisor with Charles on the note. At the same time Charles received from E. K. a bill of exchange on the Barings for \$400. The note of \$600 was paid at its maturity by E. K. Glover, who also repaid to William H. Glover & Co. the amount of the London draft which had been obtained by W. H. Glover & Co. on account of E. K. Glover. At the time Charles received these sums he gave to E. K. Glover an order on the complainants, which is as follows:

*"Union Insurance Company:* Please pay to E. K. Glover, of Rockland, \$1,000, from proceeds of policy of insurance No. 6,305, in my favor, for \$2,500, on brig J. M. Wiswell, dated April 14, 1878.

"Rockland, July 9, 1879.

C. C. GLOVER."

E. K. Glover has since commenced an action at law in the name of C. C. Glover against the company on this policy, and the same is now pending in the supreme court of Maine, Knox county. C. C. Glover subsequently instituted a similar suit in this court, and the same is here pending. The amount to be received on said policy is by agreement fixed at \$1,500, and the insurance company has filed this bill of interpleader against C. C. and E. K. Glover, that their respective rights as to this amount may be ascertained and determined.

E. K. Glover insists that he is entitled to \$1,000, and interest upon this amount, by virtue of the order of July 9th and of the delivery to him by C. C. Glover of the duplicate policy, the original being then believed to be lost. E. K. Glover testifies that on July 9th the \$1,000 then received by C. C. Glover, in cash and bill of exchange, was a loan made by him to C. C. Glover, on condition that he would secure its payment by the order and would send him the duplicate policy, which was then at Cambridgeport; that within a few days he received by mail the policy, in compliance with such agreement. He denies that the \$1,000 was raised on joint account, to be used by C. C. Glover for the benefit of the owners of the brig in adjusting the general average charges in England, and he asserts that from the first he, by his letters to Charles, which are in evidence, refused to have any concern in the general average claim, and so repeatedly informed Charles after his return to Rockland, telling him if he carried on the controversy he must do it at his own expense, and he was welcome to everything that should be realized therefrom; that he, E. K., would make no claim to any part of it and would have nothing to do with it; that the note of \$600 was paid by him, and also the amount advanced by William H. Glover & Co. for the bill on Barings. These statements of E. K. Glover are in all respects corroborated and sustained by the testimony of W. H. Glover.

On the other hand, while C. C. Glover insists that he did not borrow of E. K. the \$1,000, but that it was raised by him and his brothers, to be by him expended in England in defraying the charges and expenses incurred about the general average claims, from which he believed the owners of the brig would receive a large amount from the owners of the cargo, he is utterly unable to give any explanation of his order for \$1,000. He is inclined to



admit that it bears his signature, but he testifies that he has not the least recollection of it, and asserts that, if he did give it, it was that E. K. Glover might have authority from him to collect \$1,000 from the company if it declined to pay a total loss, but was ready to pay that sum as for a partial loss. This explanation is of no moment, as on the seventh of July, two days prior to the order, C. C. Glover had given E. K. a power of attorney, which authorized him to collect the policy, and under which he was fully empowered to receive any sum the company might be willing to pay, although not the full amount of the policy.

Mrs. Sherman, a sister of C. C. Glover, with her husband, have been introduced as witnesses by him, but the court does not find in their testimony anything which would justify the court in discrediting the sworn statements of both E. K. and William H. Glover that the \$1,000 was a personal loan made to C. C. Glover by E. K. Glover, the payment of which was secured by the order on the company and the delivery of the duplicate policy. The counsel of C. C. Glover insist that if such should be the finding of the court, still E. K. Glover was not thereby authorized to maintain an action on the policy in the name of C. C. Glover and collect from the company the amount so loaned to C. C. Glover; that the order was not an assignment of the policy and of whatever might be collected therefrom, but was for a portion only of the fund, and did not create an equitable lien in favor of E. K. Glover for the amount of the order.

In support of his views the learned counsel relies on *Palmer v. Merrill*, 6 Cushing, 287.

That case was an action at law to recover from an administrator a portion of the amount by him collected from an insurance company on a policy of insurance on the life of defendant's intestate for \$1,000, a portion of this sum, \$400, having been assigned to the plaintiff by an order written on the policy, but the policy had always been retained by the intestate. It did not appear that plaintiff, prior to the death of the insured, had any knowledge of the assignment or had ever seen the policy, so that there was never any delivery to him of the policy or of the assignment. The court hold that the action could not be maintained, but the case is essentially different from the present, which is a bill in equity, by the holder of the fund, against the assignor and assignee, to whom the policy and order were both delivered.

The question now for decision is not whether E. K. Glover can maintain his action in the state court to recover from the insurance company the \$1,000 loaned by him to C. C. Glover or the full amount due on the policy, but it is whether, in this bill of interpleader brought by the company, the court will determine the equitable rights of the respective parties, and whether E. K. has acquired

such a lien upon the fund as will be enforced and protected by a court of equity.

In *Story, Equity*, 1044, the learned author says: "A trust would be created in favor of the equitable assignee of the fund, even if the assignment is of a part only of the amount, and would constitute an equitable lien upon it."

In *Christmas v. Russell*, 14 Wall. 84, the language is: "An order to pay out of a specified fund has always been held to be a valid assignment in equity, and to fulfil all the requirements of the law."

The case of *Savings Bank v. Adae*, 8 FED. REP. 108, is in principle identical with the present. A party drew his check on a bank in favor of a creditor, and next day failed. The check was presented for payment and was refused, although when drawn the drawer had on deposit to his credit in the bank more than its amount. The bank brought a bill of interpleader against the holder of the check and the assignee in insolvency of the drawer, and it was held that the check was an equitable assignment of that amount, and its holder acquired a lien therefor and was entitled to its payment.

These authorities, together with many others of a similar import, sustain the lien of E. K. Glover on this policy and its proceeds as security for the payment of the loan of \$1,000 made by him to C. C. Glover, and it is so decreed.

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### COONS & BRAINE v. TOME and others.

(Circuit Court, W. D. Pennsylvania. December 17, 1881.)

#### 1. CORPORATIONS—DIRECTORS—CREDITORS.

The directors of a corporation stand in confidential relations to its creditors, towards whom they are bound to act with perfect fairness. They are, at least, *quasi* trustees for the creditors; and where the corporation is insolvent, good faith forbids that the directors should use their position to save themselves, or one of their number, at the expense of other creditors.

#### 2. SAME—INSOLVENCY—PREFERENCES.

Where the board of directors of an insolvent corporation confessed a judgment against the corporation in favor of one of their number, who was also the president of the corporation and principal stockholder, with a view of giving him priority of lien over another creditor, who was about to obtain a judgment in a judicial proceeding, *held*, that such preference could not be upheld, but that the two judgments must stand on a footing of equality in respect to the commencement of the lien, and share *pro rata* in the proceeds of the property available for their payment.

### 3. PAYMENTS—APPLICATION OF.

The law will apply a payment in the way most beneficial to the creditor, and therefore to the debt least secured.

In Equity.

*William A. Stone*, for plaintiffs.

*J. O. Parker*, for defendants.

ACHESON, D. J. The Minnequa Springs Improvement Company, a corporation of the state of Pennsylvania, on the fifteenth of June, 1877, issued its coupon bonds of the denomination of \$500 each, amounting to \$250,000, payable to bearer on September 1, 1897, with interest payable semi-annually;—which bonds were secured by the company's mortgage, of even date, to Benjamin S. Bentley, trustee of the bondholders. The mortgage covers a tract of land in Bradford county, Pennsylvania, containing about 20 acres, upon which are the "Minnequa Springs" and the "Minnequa House."

On January 24, 1878, the whole of these bonds were held and owned by Peter Herdic, who on that day sold them, and also 9,320 shares of the stock of the company, to the defendant Jacob Tome. The evidence establishes that Tome was a *bona fide* purchaser for value of all said bonds. The improvement company acquired, prior to the transactions about to be mentioned, other lands contiguous to the mortgaged premises. On the thirteenth of August, 1878, Coons & Braine, the present complainants, brought suit in the court of common pleas of Bradford county against the said corporation to recover damages sustained by them by the breaking of a dam alleged to have been improperly and negligently constructed by the company. This case was ruled out and tried before arbitrators, who, by their award, filed in court on October 26, 1878, found the sum of \$5,875 in favor of the plaintiffs. At this time, and from June 12, 1878, Jacob Tome was a director of the corporation, and its president,—Kelion Packard, and John W. Maynard being the other directors,—any two of whom constituted a quorum of the board.

While the suit of Coons & Braine was pending before the arbitrators, Jacob Tome, on October 18, 1878, instituted an action in this court against the corporation to recover his interest on said bonds, then past due and unpaid, and also some money he had advanced to the company. On the twenty-second of October, 1878, during an adjournment of the arbitration, the board of directors of the corporation met in special session,—the three directors, Tome, Packard, and Maynard, being present,—and passed a resolution authorizing and directing the solicitor of the company to confess a judgment in favor

of Tome and against the corporation for the amount of his claim sued for; and, accordingly, the next day, October 23, 1878, such judgment was confessed for the sum of \$19,248.53. Save for such action of the board, judgment could not have been obtained in that suit until after the first Monday of November, 1878,—the return-day of the writ of summons.

At the date of the special meeting of the board of directors the corporation was insolvent, and this must have been known to the board, whose purpose in authorizing the confession of judgment undoubtedly was to give Jacob Tome priority of lien over Coons & Braine. I am, however, satisfied from the evidence that there was no actual fraud in the transaction, either on the part of Tome or the board of directors. The claim in suit was an honest debt due Tome, and the corporation was without defence. It may be assumed, too, that the board entertained the conviction that the claim which Coons & Braine were pressing to judgment was not a meritorious one, and doubtless the board believed they had morally and legally the right to prefer Mr. Tome by giving him the prior judgment lien.

But could the board of directors, under the circumstances, give such preference to Jacob Tome, who was both a director of the corporation and the president, and also the principal stockholder, owning, indeed, at least eight-tenths of the entire capital stock? I am of opinion that they could not. The mortgaged premises, it is shown, are wholly insufficient to pay the principal of the mortgage debt; and if the lien of Tome's confessed judgment is to prevail over that of Coons & Braine, the latter will receive nothing out of the assets of this insolvent corporation. Such a result, thus brought about, would be so inequitable that it cannot receive judicial sanction. True, a failing debtor, ordinarily, may prefer one creditor over another. But the circumstances here were such as to take the case out of the general rule. The directors of a corporation stand in confidential relations to its creditors, towards whom they are bound to act with perfect fairness. They are, at least, *quasi* trustees for the creditors; and where the corporation is insolvent, good faith forbids that the directors should use their position to save themselves, or one of their number, at the expense of other creditors. *Drury v. Cross*, 7 Wall. 302; *Jackson v. Ludeling*, 21 Wall. 616; *Richards v. New Hampshire Ins. Co.* 43 N. H. 263.

The special prayers of the bill in respect to Tome's said judgment are that he may be restrained from proceeding to enforce it by execution, and that it be declared null and void. But this is not the

measure of relief to which the complainants are justly entitled. Tome's judgment, as we have seen, is not tainted with actual fraud. It represents a *bona fide* debt, and while it cannot be allowed priority over the judgment of the complainants, it is not to be treated as a nullity, or postponed to the complainant's judgment. Equity, however, does require that the complainant's judgment and Tome's said judgment, in respect to the commencement of lien, shall be placed on a footing of equality, and shall share *pro rata* in the proceeds of the real estate available for their payment.

The mortgage above recited contains a provision that, in case of default exceeding 90 days in the payment of any of the interest coupons, the whole principal of all the aforesaid bonds "shall thereupon become due and payable," etc. Such default having occurred, Jacob Tome, who, we have seen, owned all the bonds, on November 23, 1878, brought an action in his own name in this court against the Minnequa Springs Improvement Company to recover the principal of the bonds; and on December 4, 1878, for want of an affidavit of defence, judgment under the rules of court was entered against the corporation for \$250,000. The complainants impeach this judgment on the ground that Tome could not enforce the clause whereby the principal of the bonds became due, except through Benjamin S. Bentley, the trustee named in the mortgage, or without notice to him, and a written request first made upon him to proceed according to the provisions contained in the mortgage. But what right have the complainants to set up the alleged irregularities? The proceedings in that suit were altogether adversary, and as the corporation suffered judgment to go by default, and is not complaining, why should Coons & Braine be permitted to question the regularity of the proceedings? Moreover, this judgment having been entered after the complainants' lien had attached, I am at a loss to see how they are in anywise prejudiced. Their prayers for relief, so far as they relate to this judgment, must, therefore, be refused.

It appears that in November and December, 1878, the Minnequa House and its contents, etc., were destroyed by fire. This property was insured for the benefit of the holders of said bonds, and by the terms of the policies the loss was payable to Bentley, the trustee. After the fire, Bentley executed to Jacob Tome a power of attorney authorizing him to collect the insurance moneys. Pursuant to this authority, Tome collected about \$43,000,—from the insurance on the premises about \$19,000,—and the balance on account of the buildings. The whole of this money Tome applied to the principal of his debt

on the said bonds, entering a credit therefor on his \$250,000 judgment. Of this application complaint is made by Coons & Braine, who insist that these moneys should have been applied first to the matured interest coupons embraced in Tome's earlier judgment, (for \$19,248.53,) and thereby that judgment would have been almost entirely paid, to the relief of the complainants. But upon what principle can the complainants control the application of the insurance moneys? What equities have they superior to those of Jacob Tome? I perceive none. The corporation, it is to be observed, did not undertake to direct the application, and is not objecting to the appropriation made by Tome. His appropriation is the very one the law itself would have made, in the absence of any by Tome or the corporation; for it is well settled that the law will apply a payment in the way most beneficial to the creditor, and therefore to the debt least secured. *Field v. Holland*, 6 Cranch, 8; *Pierce v. Sweet*, 33 Pa. St. 151; *Foster v. McGraw*, 64 Pa. St. 464.

Let a decree be drawn in accordance with the views expressed in this opinion.

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### McDERMOTT and others v. COPELAND and another.

(Circuit Court, E. D. Michigan. December 12, 1881.)

#### 1. EQUITY—DECEDENT'S ESTATE—BILL BY A DISTRIBUTEE.

A bill in equity will not lie in a circuit court by a distributee, against the executors of an estate, to compel them to collect and pay over to complainants their distributive shares of the estate, where no fraud is charged, and it appears the estate has been closed in the probate court, the executors discharged, and an order entered for the distribution of the estate, which consisted of property then in the hands of a surviving partner of the decedent.

#### 2. EXECUTORS—DUTIES OF, UNDER THE LAWS OF MICHIGAN.

By the laws of Michigan an executor is not bound to take possession of the estate any further than is necessary to pay the debts, funeral charges, expenses of administration, specific legacies, etc., and the probate court may then set off the residue to the persons entitled thereto, who may bring suit to recover it directly against the parties in possession.

#### In Equity.

This was a bill in equity by distributees against executors to compel an accounting and allotment to the complainants of their respective shares in the estate of Frank Nevin, late deceased. The bill set forth in substance that Nevin died in 1878, and by his will, which was admitted to probate, defendants were appointed his executors; that decedent was a partner of one Mills in the tobacco business, and a large portion of his estate was invested in the property of the firm, which was sold to Mills; that of the purchase price,

\$118,749.50 was paid over to the executors; but that \$39,237.66 was never paid over to them, and they have never accounted for the same. The bill further alleged that defendants filed their final account, and on the seventeenth day of December were discharged by the probate court, and an order was entered that the distributees entitled to said last-mentioned amount should look to Mr. Mills for it; that in carrying out their trust the executors have proved unfaithful in failing to collect this amount, and also in paying themselves \$5,000 compensation, in addition to the legacies given them. Certain other charges were made against the defendants, which were abandoned at the hearing. The answer denied that the interest of Nevin in the partnership was sold to said Mills, but averred that the interest of the estate in the merchandise, fixtures, and machinery was sold for \$27,897.21, all of which was accounted for; that the executors filed their final account, and petitioned for discharge, and were discharged on the seventeenth day of December, 1878. The answer further denied the entry of an order that the heirs should look to Mills for their respective shares of the \$39,000, and averred that an order was entered for the distribution of the remainder of the estate, which consisted of property belonging to the partnership, all of which property was in the possession of and under the control of Mills, as surviving partner, and consisted mainly of claims owing for merchandise. It admitted the charge of \$5,000 for services, and averred the same was allowed for defending the will of said Nevin, (a long contest,) and insisted the allowance was proper, and was approved by the probate court.

*Alfred Russell*, for complainants.

*G. V. N. Lothrop*, for defendants.

BROWN, D. J. This case was once argued upon a demurrer to the bill, which was overruled *pro forma*, in order that the point at issue might be more fully presented upon bill and answer. The question involved, is, in substance, whether executors, who have filed their final account in the probate court and have received their discharge, without fraud or collusion, can be compelled, notwithstanding this decree, to account to the next of kin for personal property which they never have reduced to their possession, and which was set off by the probate court directly to the complainants. Beyond all controversy, the judgment or decree of a state court, rendered in a case of which it had complete jurisdiction, cannot be revised or set aside by a collateral proceeding here. *Nougue v. Clapp*, 101 U. S. 551. And this is the case, even if the decree be fraudulent, unless there be also collusion, or some act of the parties tantamount thereto; as, for instance, if a decree be obtained *ex parte* by fraudulent representations. *The Acorn*, 2 Abb. (U. S.) 434; *Michaels v. Post*, 21 Wall. 398; *U. S. v. Throckmorton*, 98 U. S. 61.

Whatever may have been the rule regarding ecclesiastical courts

in England, there is no doubt that in this country courts of probate are almost universally courts of record, and their decrees as conclusive in collateral proceedings as those of any other court of record. Gary, Probate Law, § 24; *Tebbets v. Tilton*, 24 N. H. 120; *Ostrom v. Curtis*, 1 Cush. 461; *Cummings v. Cummings*, 123 Mass. 271; *Barker v. Barker*, 14 Wis. 131; *Holmes v. Cal. & Or. R. Co.* 9 FED. REP. 229.

In *Loring v. Steineman*, 1 Metc. 204, the principle of *res adjudicata* was applied to a decree of distribution, made upon such notice as is required by law.

Certain cases are cited by the complainants, which, it is insisted, establish an exception to this rule in the case of decrees of probate courts; but, upon a careful examination, we think all of them are consonant with the general proposition above stated.

In *Payne v. Hook*, 7 Wall. 425, a bill was sustained by a distributee to obtain her share in the estate of her brother, who died intestate, and whose estate was committed to the charge of a public administrator by an order of a county court. The bill differed from the one under consideration, however, in the important facts that it charged gross misconduct on the part of the administrator; that he had made false settlements with the court of probate; had not filed a true inventory of the property on hand; had used the money of the estate for his private gain; and obtained from the complainant, by fraudulent representations, a receipt in full for her share of the estate on the payment of a less sum than she was entitled to receive. It further appeared from the bill that the defendant had not yet made his final settlement in the probate court. It is stated in the opinion that the fraudulent conduct of the administrator was the groundwork of the bill, and it is evident that the question of a discharge by the probate court did not enter into the consideration of the case.

In *Horn v. Lockhart*, 17 Wall. 570, a bill was filed against an executor to compel a settlement and distribution of the proceeds. The defence was that the probate court, in which the settlement of the estate was pending, had, by its decree, allowed the executor to invest the proceeds of the estate in confederate bonds, and the supreme court held that, as this was an act in furtherance and aid of the rebellion, it was illegal and void, and that the probate court could not give it validity. This was the ordinary case of a court acting without jurisdiction.

In *Pratt v. Northam*, 5 Mason, 95, it was held by Mr. Justice Story



that the judgment of the court of probate was not conclusive where it had been obtained by fraud; by which he undoubtedly means such fraud as could be taken advantage of in a collateral proceeding.

This is also the gravamen of the bill in the *Union Bank of Tennessee v. Jolly's Administrators*, 18 How. 503, and *Donohue v. Roberts*, 1 FED. REP. 449. I know of no authority, however, which will authorize this court to revise or disturb the decree of a probate court, obtained without fraudulent conduct on the part of the executor, in a case of which it had jurisdiction. Had the bill charged that the proceedings in the probate court were still pending, or that the decree settling the estate had been fraudulently obtained, the case would have presented a different question. But, even if this decree were impeachable, we do not see that the executors have been guilty of any dereliction of duty of which the plaintiffs are entitled to complain. They have paid all the debts and specific legacies, and procured the entry of an order setting off the residue of the estate to the distributees under the will. This seems to be the exact course authorized by the statute. Section 4407 of the Compiled Laws provides that the executor or administrator shall be entitled to the possession of the personal estate of the deceased, until assignment or distribution of the same to the heirs, legatees, or other persons entitled thereto, by the order of the probate court, or until the estate is finally settled.

In *Brown v. Forache*, 43 Mich. 497, it is said that this section does not render it imperative that the personal representative should take possession of the estate; it only empowers him to do so. Section 4496 authorizes the probate court, after the payment of the debts, funeral charges, and expenses of administration, and after the allowance made for the expenses of maintenance of the family of the deceased, etc., to assign the residue of the estate to such other persons as are by law entitled to the same. Section 4497: "In such decree the court shall name the persons, and the proportions to which each shall be entitled, and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same." It appears that the decree of the probate court, in the case under consideration, was entered in conformity with these provisions, and the right of the complainants to proceed against any person having in his possession the estate, or any portion thereof, belonging to decedent, to obtain their distributive share of the same, appears to be clearly allowed under this section.

It appears to me, however, that in filing his bill against the administrator, to obtain an accounting, they have mistaken their remedy. For both these reasons the bill must be dismissed, with costs.

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BRUCE v. GIBSON.\*

(Circuit Court, S. D. Ohio, W. D. November 21, 1881.)

1. REMOVAL OF CAUSES—ACT OF 1875—CITIZENSHIP AT TIME OF APPLICATION FOR REMOVAL.

Under the removal act of 1875 a case is not removable unless the required diversity of citizenship exists at the time the application for removal is made; it is not sufficient that the required diversity in citizenship existed when the suit was commenced in the state court.

2. SAME—CONSTITUTIONALITY.

And if the act authorized a removal of a cause when the required diversity of citizenship did not exist at the time of the application for removal, it would, to that extent, be unconstitutional and void

On Motion to Remand.

*O'Connor, Glidden & Burgoyne and Lincoln, Stephens & Slattery, for motion.*

*Thos. McDougall and Hoadly, Johnson & Colston, contra.*

BAXTER, C. J. This suit was commenced in the superior court of Cincinnati, April 12, 1879. When the pleadings were concluded, and an issue reached in March, 1881, it was, upon defendant's petition alleging that at the commencement of the suit, as well as at the time of the filing of his petition, the plaintiff was a citizen of New York and defendant a citizen of Ohio, removed into this court for trial. But the plaintiff, by plea filed here, says that at the time defendant filed his petition for the removal of the case she was a citizen of Ohio. The issue thus made was, by consent of the parties, tried by the court. From the evidence adduced we find that, at the commencement of the suit, the plaintiff was a citizen of New York, but that at the time defendant applied to have it removed, and for 17 months prior thereto, she was a citizen, with defendant, of the state of Ohio. Upon this finding the plaintiff moves to remand the case to the state court.

The controversy has been sharply defined by the arguments of counsel. On the one side it is insisted that the right of removal depends upon the *status* of the parties at the commencement of the

\*Reported by J. C. Harper, Esq., of the Cincinnati bar.

suit, while on the other the contention is that the *status* of the parties at the time the application was made must control. This question has never been decided by the supreme court. Though twice raised in argument before that tribunal it was on each occasion reserved for future consideration, (*Ins. Co. v. Pechner*, 95 U. S. 183; *Bondurant v. Bondurant*, 103 U. S. 285,) hence we have to look to other sources for adjudications to aid us in arriving at a correct conclusion.

But on referring to the judgments of the inferior courts we find a conflict of opinion that tends rather to embarrass than to elucidate the problem. They are as wide apart as are the arguments of counsel in this case—Mr. Justice Bradley and others holding that a case cannot be removed from a state to a federal court, under the act of 1875, unless the petition for its removal shows that the required diversity of citizenship existed at the commencement of the suit. *Houser v. Clayton*, 3 Wood, 273; *Beede v. Cheeney*, 5 FED. REP. 388; *Tapley v. Martin*, 116 Mass. 276; *Holden v. Ins. Co.* 46 N. Y. 1; *Ind. R. Co. v. Risley*, 50 Ind. 60. Whereas, Mr. Justice Wood and others hold that under the act the petition need not aver that the parties were citizens of different states at the time the suit was brought. If it shows the required citizenship when the petition is filed it will be sufficient. *Jackson v. Ins. Co.* 3 Wood. 413; *Curtin v. Decker*, 5 FED. REP. 385; 33 Ohio. St. 280; *Phoenix Life Ins. Co. v. Scattle*, 7 Cent. Law J. 398; Dillon, Removal of Causes, § 87.

These discordant decisions cannot be harmonized. It is, however, some mitigation to say that the conflict is confined to a difference of opinion touching the construction of the act of 1875. The controversy, thus restricted, is not as broad as the question in this case. We may concede the construction contended for in the line of decision first above referred to, to-wit: that a suit cannot be removed under the act of 1875 on the ground of a diversity of citizenship of the parties, unless they were citizens of different states at the commencement of the suit; and yet it would not follow that such suit could be removed on that ground after parties had become citizens of the state in which the suit is pending.

The reason for this is obvious. The national government is a government of defined and limited powers, and cannot lawfully exercise any authority except such as is expressly or impliedly conferred by the constitution. Its judicial powers are especially and specifically enumerated in that instrument. Among others, it is invested with jurisdiction of all controversies in law and equity between citizens of different states, to execute which congress has, from 1789 to 1875,

enacted statutes authorizing and providing for the removal of such cases from state to federal courts, which statutes have been uniformly recognized as valid and enforced by the courts. But no one contends that the federal courts can be authorized to divest a state court of its jurisdiction, once regularly acquired, of a suit between citizens of the same state, unless it involves title to lands claimed to have been acquired from different states, or affects ambassadors, ministers, or consuls, or is a case arising under the constitution or a law of the United States. Any statute professing to authorize such a transfer of such suit would be an encroachment upon the reserved rights of the state, in conflict with the national constitution, and void. And yet this is, in effect, the principle contended for in this case. It is true, the plaintiff and defendant were citizens of different states when the suit was begun, and it is clear that as long as this diversity of citizenship continued the suit was removable under said act; and had defendant availed himself of his right to remove it in time, the jurisdiction of this court could not have been divested or its efficiency impaired by any subsequent action of the plaintiff. But defendant took no steps for its removal until after the plaintiff became a citizen of Ohio. We think his application for the removal came too late. The act of 1875 is not susceptible of the construction contended for by defendant. If it was so expressly provided upon its face, it would, to that extent, exceed the constitutional authority of the legislative department, and would, therefore, be void.

The case will be remanded and judgment entered against defendant for the costs of this court.

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### *In re* PITTS, Bankrupt.

(District Court, S. D. New York. November 18, 1881.)

#### 1. CREDITORS' BILL.—FRAUDULENT JUDGMENT AND TRANSFER—REV. ST. § 5057—ASSIGNEE—INJUNCTION DISSOLVED.

Judgment creditors, after the return of execution unsatisfied, on filing a bill to reach property of the debtor conveyed by a fraudulent transfer, or a fictitious judgment and sale on execution thereon, acquire an equitable lien on all the property fraudulently transferred, as against the parties to the suit; but this lien, before the appointment of a receiver, will not prevail as against the levy of a subsequent execution on such of the property as is subject to levy, nor against an assignee in bankruptcy who stands in a similar situation.

Such a suit having been commenced before proceedings in bankruptcy, and a stay of that suit having been afterwards procured in bankruptcy, and the assignee having knowledge of all the facts more than three years ago, and failing

to take any action assailing the alleged fraudulent transfer by the bankrupt, *held*, that his time for so doing, under section 5057, had expired, and that the stay upon the prosecution of the judgment creditors' bill heretofore granted should, therefore, be dissolved.

In Bankruptcy. Motion to dissolve injunction.

*Wm. H. Sloan*, for judgment creditors.

*C. Whittaker*, for assignee.

BROWN, D. J. The bankrupt filed his voluntary petition in bankruptcy on the twenty-seventh day of July, 1878; adjudication of bankruptcy was made August 29, 1878, and an assignee appointed. The bankrupt had previously carried on a grocery store at Kingston, and on January 30, 1878, his brother, Henry H. Pitts, recovered a judgment against him, by default, for \$6,246.01, upon which execution was immediately issued to the sheriff, and his stock of goods sold out thereunder on February 6, 1878, to Henry, the judgment creditor, who took possession and continued the same business. Thereafter, many of the creditors of the bankrupt, who had sold him more or less of this stock of goods on credit, commenced suits against him, procured his arrest therein for fraud, and recovered judgments upon their claims. In July, 1878, some weeks previous to the commencement of proceedings in bankruptcy, several of these judgment creditors had united in filing a bill in equity, on behalf of themselves and all other judgment creditors of the bankrupt, against Henry and Charles Pitts, for the purpose of having the judgment recovered by Henry H. Pitts, and the execution and sale thereunder, set aside as fraudulent and void. The complaint alleged that the said judgment was upon a false and fictitious claim; that the whole proceedings under it were for the purpose of cheating and defrauding the bankrupt's creditors; and prayed that the goods on hand be applied upon executions on the plaintiffs' judgments, and that Henry H. Pitts be also required to account to the judgment creditors for the proceeds of all goods sold by him, in the business, since he took possession on February 6th. The bankrupt, having filed his petition in bankruptcy on July 27, 1878, on the sixth of August obtained an injunction against the prosecution of the above suit in equity, to await the determination of this court on the question of his discharge.

A motion is now made to vacate this injunction and permit the suit in equity to proceed. Two prior motions have been made in this court for the same purpose,—one in November, 1878, and one in April, 1879. Both were denied; the latter on the ground that at that time the assignee in bankruptcy was the only person who

had the right to set aside the judgment and recover the property, (*Glenny v. Langdon*, 98 U. S. 20; *Trimble v. Woodhead*, 102 U. S. 647; *Moyer v. Dewey*, 103 U. S. 301,) and that the plaintiffs in the creditors' bill had not acquired any lien which could then prevail against the assignee. *Johnson v. Rogers*, 15 N. B. R. 1.

In the case last cited, *Wallace, J.*, reviewed the adjudications in this state as to the effect of a creditors' bill in securing a lien where no receiver has been appointed, and pointed out that by the law of this state such a lien does not prevail as against purchasers or other execution creditors levying upon goods or chattels, but is effective upon choses in action or equitable interests not subject to levy and sale on execution; and he held that an assignee in bankruptcy, representing the general creditors, is entitled to stand in the situation of an execution creditor as respects goods and chattels subject to execution.

That the plaintiffs in the creditors' bill enjoined in this case obtained by the commencement of that suit an equitable lien as against the defendants themselves, upon the goods or their proceeds, is plain. *Lawrence v. Bank of the Republic*, 35 N. Y. 320, 323; *Lansing v. Easton*, 7 Paige, 364; *Storm v. Waddell*, 2 Sandf. Ch. 494; *Sedgwick v. Menck*, 1 N. B. R. 675. A portion of the proceeds, also, were doubtless equitable assets, not subject to levy and sale on execution against Charles Pitts, and have been all the while subject to the equitable lien acquired by filing the creditors' bill against him and Henry. *Lawrence v. Bank of the Republic*, 35 N. Y. 321. The right of the assignee in bankruptcy to recover so much as remained of the property originally transferred to Henry Pitts could only be enforced by a suit instituted for that purpose under section 5046 or section 5129. *In re Pitts*, 8 FED. REP. 263; *Cragin v. Thompson*, 12 N. B. R. 81; *Sparhawk v. Drexel*, Id. 450; *In re Biesenthal*, 15 N. B. R. 228. His right to maintain such a suit is subject, however, to the two years' limitation prescribed by section 5057, (*Bailey v. Glover*, 21 Wall. 342,) which is to be computed from the time of discovering the fraud. The assignee in this case had knowledge of all the matters alleged in the creditors' bill in 1878, and has been notified of the proceedings on these motions since the first motion in November, 1878, now three years ago. He has not instituted any suit on behalf of the creditors to recover the property, and, though having notice of this motion, states no intention or desire of doing so, and his time for doing so has expired. So long as his right to maintain such an action existed, and so long as the equitable lien of the plaintiffs in the creditors' suit upon the goods

remaining was subordinate to his superior right, it was proper to continue the injunction. But as his rights are now barred by section 5057, no benefit to the estate of the bankrupt can possibly arise from a longer continuance of the injunction, and it would be unjust to deprive the judgment creditors of whatever right may still remain to them to prosecute to judgment the bill for equitable relief which was filed before the proceedings in bankruptcy were begun. To continue the injunction when it can serve no useful purpose to the bankrupt's estate, would be to turn the process of this court into a shield against the investigation of alleged frauds. It is for the court in which that action is brought to determine ultimately what rights still remain to the plaintiffs in the pending suit, and no impediment should be longer interposed by the injunction of this court.

An order may be entered dissolving all injunctions and stays upon the prosecution of that suit.

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*In re ELMENDORF.*

(*District Court, S. D. New York. December 12, 1881.*)

1. **BANKRUPTCY—DEPOSITS UNDER REV. ST. § 5124.**

The bankrupt is entitled to be reimbursed for a deposit made with the clerk under the provisions of section 5124 of the Revised Statutes, provided it did not form a part of his estate.

In Bankruptcy.

*W. H. Morrison*, for bankrupt.

*W. H. Gibson*, for assignee.

BROWN, D. J. This is an application by the bankrupt for an order directing the assignee to repay to him, out of the assigned estate, certain fees and disbursements necessarily paid by him to the clerk, marshal, etc., in the course of the proceedings in bankruptcy, or for disbursements which those officers would have necessarily incurred. Among the items so asked to be repaid to the bankrupt is the sum of \$50, deposited with the clerk, pursuant to section 5124, on April 30, 1878, prior to the issuing of the warrant, to the repayment of which the assignee objects. The bankrupt's voluntary petition was filed April 13, 1878.

Rule 29 of the general orders in bankruptcy provides that "the fees of the register, marshal, and clerk shall be paid or secured in all cases

before they shall be compelled to perform the duties required of them," and authorizes the court "to order the whole or such portion of the fees and costs in each case to be paid out of the fund in court, in such case, as shall seem just;" and section 5101 provides that the fees and costs of the several proceedings in bankruptcy shall be first paid in full out of the estate. Under these provisions this court has been accustomed to order reimbursement of the legal fees, and disbursements of the officers necessarily advanced by or on account of the bankrupt for the ordinary proceedings in bankruptcy, including proceedings for a discharge. *In re Olds*, 4 N. B. R. 146; *In re Heirschberg*, 2 Ben. 466; 1 N. B. R. 642. But this has been done upon the petition of some other person than the bankrupt, who has thus advanced the necessary fees; or, if done upon the bankrupt's own petition, has referred to advances presumably made by the bankrupt, not out of his own estate, which lawfully goes to his assignee, but out of means subsequently acquired or procured from other sources.

Rule 29 expressly declares that "funds deposited with the register, marshal, or clerk shall, in all cases where they come out of the bankrupt's estate, be considered as a part of such estate." The item of \$50 now asked to be reimbursed to the bankrupt was such a deposit with the clerk; and, if it comes out of the bankrupt's estate, it formed a part of that estate to which the bankrupt cannot have any claim whatever. *Anon.* 1 N. B. R. 122. The deposit in this case was made very shortly after the filing of the voluntary petition. There is nothing in the petition to indicate, nor is there any presumption, that this deposit did not come out of the bankrupt's estate. If, in fact, it was procured from other sources, the bankrupt is entitled to have it restored to him; otherwise, not. If the parties cannot agree upon the facts in reference to that point, a reference to the register in charge may be had to ascertain and report the facts in that regard.



WILSON PACKING Co. and another v. CHICAGO PACKING & PROVISION Co.

SAME v. ST. LOUIS BEEF CANNING Co.

SAME v. HUNTER and others.

(Circuit Court, N. D. Illinois. November 25, 1881.)

1. LETTERS PATENT—COOKED MEATS.

Reissued letters patent No. 6,370, dated April 6, 1875, and issued to William J. Wilson, for a new and useful improvement in the process for preserving and packing cooked meats for transportation,—consisting in thoroughly cooking the meat by boiling it in water, removing the bone and gristle, then placing it, while yet warm with cooking, into a box or case and pressing it by some suitable apparatus with sufficient force to remove the air and all superfluous moisture, and make the meat form a solid cake, and, finally, closing the box or case air-tight upon the meat,—are void for want of novelty.

2. SAME—SAME.

Claim 1, of reissue No. 7,923, dated October 23, 1877, and issued to John A. Wilson, for an improvement in metallic cases for containing cooked meats, which is for a can for packing food hermetically sealed, and constructed of pyramidal form, with rounded corners and offset ends to support the heads; and claim 3, which is a claim as an improved article of manufacture, of solid meat compressed and secured within a pyramidal case or can so that said can forms a mould for the meat, and permits its discharge as a solid cake,—are also void for want of novelty.

3. SALES OF PRODUCT OF PATENTED PROCESS—EVIDENCE OF VALIDITY.

In all doubtful cases involving the validity of a patent, the fact that the article made by the use of the process described in the patent has been extensively sold is a consideration of great weight with the court, but it is not enough *per se* to sustain the patent.

*West & Bond* and *Munday, Evarts & Adcock*, for Wilson Packing Company.

*John N. Jewett* and *Offield & Towle*, for Libby, McNiell & Libby.

*William H. Clifford* and *B. F. Thurston*, for all complainants.

*Noble & Orrick*, *Coburn & Thatcher*, *E. N. Dickinson*, and *Eldridge & Tourtelotte*, for defendants.

Before DRUMMOND, C. J., and BLODGETT, D. J.

PER CURIAM. The cases have all been argued together, and involve the same questions of law and fact, and are founded upon the reissued patent of William J. Wilson, No. 6,370, of April 6, 1875, for a new and useful improvement in the process for preserving and packing cooked meats for transportation, and in the reissued patent of John A. Wilson, No. 7,923, of October 23, 1877, for a new and useful improvement in metallic cans for containing cooked meat. The reissued patent of William C. Marshall, No. 6,451, of May 25,

1875, for a new and improved process for preserving meats, although set forth in the pleadings, is not relied on in the argument, and need not be further considered as an independant ground of relief. These patents were before us in 1879, in the case of *Wilson Packing Co. v. Pratt*, 11 Chi. Leg. News, 353.

The most important questions in the case grow out of the patent of William J. Wilson. In his original patent he stated that, in carrying out his invention, the meat was to be first cooked thoroughly, at a temperature of 212 deg. Fahrenheit, so that all the bone and gristle could be removed and the meat yet retain its natural grain and integrity; that a measured quantity of this cooked meat was then, while yet warm with cooking, pressed by any suitable apparatus into a previously prepared box or case, with sufficient force to remove the air and all superfluous moisture, and make the meat form a solid cake, and that then the box or case was closed air-tight upon the meat. It will be observed that he did not distinctly set forth in this original patent in what manner the meat was to be first cooked. There is in the reissue no change in the description of carrying out the invention, except he declares it is a "preferable" mode of putting the meat cooked into a box or case while yet warm with cooking. The implication, of course, is that it was not an indispensable part of his description of the invention that it should be thus put in warm. There were two claims in the original, as there are in the reissue, and the only difference between them is, that in the original, the first claim states that the cooked meat is to be pressed into an air-tight package "while heated with cooking," these last words being omitted in the first claim of the reissue. While these suits have been pending the plaintiffs have filed a disclaimer of the use of the word "preferably" of the reissue, thus eliminating it from the description therein contained, and leaving the patent in this respect as it was in its original form. They have also disclaimed the use of the following words of the description in the reissued patent: "The meat is first cooked thoroughly at a temperature of 212 deg. Fahrenheit, so that all the bone and gristle can be removed and the meat yet retain its natural grain and integrity;" and instead thereof insert the following words, viz.: "The meat is first cooked thoroughly by boiling it in water so that all the bone and gristle can be removed and the meat yet retain its natural grain and integrity."

Waiving the objections which have been made to the validity of these disclaimers, we may now state what the invention of the William J. Wilson patent is. The meat is to be first thoroughly cooked

by boiling it in water, so that all the bone and gristle can be removed and the meat yet retain its natural grain and integrity. While yet warm with cooking it must, by some suitable apparatus, be pressed into a box or case, previously prepared, with sufficient force to remove the air and all superfluous moisture, and make the meat form a solid cake. The box or case is then to be closed air-tight upon the meat. So that the invention contains these elements:

(1) Thoroughly cooking the meat by boiling it in water, removing the bone and gristle. (2) Placing it, while yet warm with cooking, into a box or case, and pressing it by some suitable apparatus with sufficient force to remove the air and all superfluous moisture, and make the meat form a solid cake. (3) Closing the box or case air-tight upon the meat.

It will thus be observed that the first requisite is that the meat must be thoroughly cooked by boiling it in water, that mode of cooking called "stewing" not being necessarily excluded, unless the words declaring that "the meat yet retain its natural grain and integrity" have that effect. The patent limits the cooking to this particular mode; baking, roasting, and steaming being excluded as modes of cooking meat. After the bone and gristle are removed there is no description given of any particular manner in which the meat is to be treated before it is put into the box or case, unless the use of the language that "it is then wholesome and palatable" has that effect.

And although the evidence shows that all the meat put up by the plaintiffs, and which has entered so extensively into the markets of the country for sale, is corned meat, that is not a part of the patent; and fresh meat, without antiseptics of any kind, if thoroughly cooked by boiling in water, with the bone and gristle removed, and if, while yet warm with cooking, put into a box or case, closed air-tight, would be within the description of the patent. Neither is anything said of the extent of the pressure to which the meat is to be subjected when placed in the box or case, except that it must be with sufficient force to remove the air and all superfluous moisture, so that the meat will form a solid cake; nor is the degree of warmth named which must exist when the meat is put into the box or case; neither is any description given of the manner in which the box or case is to be closed air-tight upon the meat. It is claimed by the plaintiffs that this combination of the manner of cooking and preserving meats for transportation is new, and entitled William J. Wilson to a patent. It should be stated that in the original as well as in the reissued patent of William J. Wilson, it seems to be implied by the second claim,

which is made in each, that the box or case must be *hermetically* sealed. Some criticism has been made upon the use of this word. We do not understand it to mean the same as if it were employed in describing anything as hermetically sealed in a laboratory, but only that the package should be so sealed as to exclude the passage of air into or out of the box or case. The patentee says that this box or case may be made of wood or metal, or both combined, of any suitable form or shape, and of any desired dimensions. It is, perhaps, unnecessary for us to inquire, as all the parties in this case use metal, whether or not the box or case could possibly be made of wood, or whether, in order to accomplish the object which the patentee had in view, it must always be made of metal.

We will, therefore, direct our attention, in the first place, to the question whether or not what William J. Wilson describes in his specifications, as just stated, was the proper subject of a patent.

The cooking of meat thoroughly by boiling it in water, so that the bone and gristle can be removed, has always been known. If it be admitted that the box or can must be hermetically sealed in order to be air-tight, that was an old device. The Appert process, described in Durand's English patent of 1810, required that the vessel (case or box) in which the food was placed should be air-tight, and that has ever since been regarded as indispensable in any process for preserving such food as is the subject of controversy here. Before the date of the patent to William J. Wilson, meat was placed in a package and subjected to pressure to remove the air, and it is clear any superfluous moisture was thus also removed from the meat. This is shown in the Marshall patent of 1864, because it is manifest his description of the process necessarily implies the removal of the superfluous moisture from the meat, as well as the removal of the air from the meat by pressure, and the hermetical sealing of the box or case in which the meat is placed for preservation, transportation, and sale. De Lignac (1855) submitted meat to a high pressure in the tin cans in which it was to be preserved, and which, apparently, were hermetically sealed. Lyman (1869) roasted his meat before putting it into the box or can, and he speaks in his specifications of stewing, *boiling*, or roasting the meat as being the ordinary mode at that time employed for preserving meat before packing it in cans. It will thus be seen that, prior to the issuing of William J. Wilson's original patent, in 1874, meat was cooked in various ways; was subjected to pressure, by which the air and the superfluous moisture were expelled from it, both before and after it was put in the case or box

for preservation, and these boxes or cases were hermetically sealed in order to make them air-tight.

The evidence seems to show that at the present time, in order most surely to preserve meat, it is necessary to subject the case or can in which the meat is packed to what is called "processing," which we understand to mean this: There is an opening in the can through which the meat is introduced. When the can is filled the hole is soldered up. It is then subjected to heat, a puncture made, the air and steam permitted to escape, and then the puncture also soldered up. This is not a new operation, but has long been known. In fact, it is substantially described in the Durand patent as a part of the Appert mode of preserving meat; for, although the details here described are not fully given in the Durand patent, still, they are necessarily implied from the statement that the aperture is left in the vessel until the heat shall have produced the proper effect, when it is to be closed. In Appert's method of preserving animal and vegetable food, vessels containing it were placed in a boiler filled with cold water, and then heat was applied up to the boiling point, and vegetables were to be put into the vessels in a raw or crude state—animal substances raw or partly cooked. The "processing," as it is termed, is not set forth in the William J. Wilson patent, unless necessarily implied from the statement that in thus preparing and packing the meat in an air-tight box or case it is a part of the operation. All that the patent says is that after the meat is put into the box or case, and the proper pressure is applied, the box or case is then closed air-tight upon the meat; and if it is also implied that the box, as we have heretofore assumed, is hermetically sealed, still, it is not stated that it is to be subjected to the "ordinary process" in canning.

It seems to be conceded that the reasons which render this necessary, in order to properly preserve meat or vegetables, were not well known at the time it was adopted. The theory at present received upon this subject is that it is necessary to expel from the can or case the air, and what are called the germs of fermentation and putrefaction which exist in the air, and which are destroyed when a high degree of heat is applied; and the air being thus expelled, before it can re-enter, the box is made air-tight. These invisible germs, supposed to be floating in the air, must be killed or removed, or they will enter into the vegetable or animal substances, and, in a short time, produce putrefaction, and, of course, destroy them as an article of food. There seems to be, therefore, nothing left in the description of the

mode of preserving meat pointed out in the patent of William J. Wilson unless it is in putting the meat while warm with cooking into the box or case. Can that be said to be patentable as a part of the mode of preserving meat, even if it be conceded it had never been done before? We think not. No more than if, prior to the date of the William J. Wilson patent, in order to preserve meat, it had never been put into a can or case thoroughly cooked. Neither of them seems to require ingenuity or the exercise of the inventive faculty. It is manifest, when we consider what was known at the date of the William J. Wilson patent, that these or other methods could be adopted of putting the meat into the case or can for preservation without encroaching upon the domain of the invention of any one.

There can be no doubt that, within a few years past, the method of preserving meat adopted by William J. Wilson has caused the article to be extensively used and sold in the markets of this and other countries. That argument has been pressed with great force upon the court in this case.

It may be admitted that, in all doubtful cases involving the validity of a patent, the fact that a mode described in the patent has gone into extensive use has and often will induce courts to decide in favor of the patent. But, while this is so, courts ought not, merely because of such use, to sustain a patent. The rights of the public are to be protected as well as those of individuals, and a monopoly should not be allowed unless the right to it is clearly shown. But the true explanation of the success which has attended this and similar modes of preserving meat may be in the fact that there has been a tendency in the public of late years to use all kinds of canned meats and fruits to a much greater extent than formerly, owing to the increased care and skill in their preparation and packing; and we think all William J. Wilson and those who act under him can claim is, that they have been particularly careful in selecting, preparing, seasoning, cooking, and canning their meat, by which it has acquired a high reputation; and upon that, in our opinion, they must rely, and not upon a monopoly under the patent law.

The John A. Wilson patent, of October 23, 1877, reissue No. 7,923, is for "an improvement in metallic cases for containing cooked meats, \* \* \*" and, as he describes it,—

"Consists in a pyramidal-shaped can, having rounded corners and both ends slightly flaring, to form shoulders, against which the head or end pieces rest. \* \* \* A represents the body of my can made in the form of a truncated pyramid, with rounded corners, and of any desired number of sides, though I

prefer to make with four sides. \* \* \* In packing cooked meats it is done by means of a plunger through an aperture in the large head, *b*, which opening is afterwards hermetically sealed by means of a cap or plate, *d*. \* \* \* The can is to be opened at the larger end, at or near the shoulder, by means of a suitable can-opener, so that when the can is reversed a slight tap on the smaller head will cause the solidly-packed meat to slide out in one piece, so as to be readily sliced as desired."

The claims in controversy here are the first and third:

(1) "A can for packing food hermetically sealed, and constructed of pyramidal form, with rounded corners and offset ends to support the heads, said heads being secured as shown and described."

(3) "As an improved article of manufacture, solid meat compressed and secured within a pyramidal case or can, so that said can forms a mould for the meat, and permits its discharge as a solid cake, substantially as specified."

And to these claims defendants interpose two defences:

(1) That the patent is void for want of novelty so far as the two features or claims in question are concerned. (2) That defendants do not infringe.

It will be seen that the case or can covered by this patent must have certain features or characteristics:

(1) It must be of "pyramidal form, with rounded corners." (2) It may have "any number of sides," although the patentee "prefers four sides." (3) It must have "rounded corners," and the ends must be "slightly flaring," to form shoulders, against which the "head or end pieces rest."

There are some further details of construction, such as the mode of fastening in the heads by turning the flaring edge of the can inward over the flange of the head so as to make three thicknesses of metal, and, as he said, make a tight joint "with or without solder," and leaving an aperture or stud hole in the large head through which the meat is to be forced, which hole is to be closed by a cap. But as no notice is taken of these in the claims, we presume they are not considered as of the substance of the patent. By a stipulation filed in these cases, found on page 942 of defendants' record, it is admitted that "conical tin cans were made and used for canning alimentary substances, and sealed air-tight, prior to the date of the Wilson patents that are the subject of controversy in these cases."

The proof also shows that the French patent of one Emile Peltier was recorded in April, 1859, wherein he described pyramidal-shaped cans for the preservation of food, by hermetically sealing such cans. We may also add to this, from our common knowledge, the well-known glasses and moulds used by housekeepers in domestic life for preserving jellies, boned turkey, head-cheese, etc., which were all, from the

very necessity of the uses to which they were applied, more or less flaring, conical, or pyramidal in shape, and made so, presumably, for the purpose of turning out, or discharging, the contents in a solid cake. If, therefore, there was occasion, at the time this patentee entered the field of improvement, to use a pyramidal or conical-shaped can or case, there was no need to call in the aid of inventive genius to secure or contrive its construction. Those who wanted such a can or case had only to take those forms of cans then in general use, and adapt them, by mere mechanical changes, to the purpose for which they were designed. With these conical and pyramidal-shaped cans, well known and described in the art of preserving food, there was not only no room, but absolutely no need, for invention in applying them to the purposes of preserving cooked meats. There is nothing in the proof showing, or tending to show, that cooked meats require any different shaped cans to contain or preserve them than do other alimentary substances. The only advantage gained by this shape, suggested in the patent, is that the solidly-packed meat can be more compactly turned out of this form of can in a cake, so as to be readily sliced; but it could be equally well turned out of a conical can. In fact, a conical or pyramid-shaped or flaring can would seem naturally to suggest itself, from kindred uses in domestic life, almost as part of the idea or suggestion of packing meat solidly in a can for preservation. To come within this claim of the patent, the can must not only be pyramidal in shape, but it must have "rounded corners" and "offset ends to support the heads." The cans shown in the proof to have been used by the St. Louis Beef Canning Company, and by Robert D. Hunter, and others, are eight-sided pyramidal-shaped cans; that is, they are made with four narrow sides or panels and four wider ones, while those used by the Chicago Packing & Provision Company are pyramidal-shaped cans, with rounded corners. But this peculiarity of construction alone can hardly be deemed the subject-matter of a patent. In making a pyramidal-shaped can of sheet metal it is obvious that the corners would be naturally more or less rounded, unless special pains were taken to avoid that shape, and turn the corners squarely; and with conical and pyramidal-shaped cans, known to the art, it would not seem to be invention to vary the form of construction by turning the corners with a curve instead of forcing the sheet metal forming the shell of the can into an angle more or less obtuse.

In his specifications describing the mode of constructing his can



this patentee says: "Both ends of the body are made slightly flaring, so as to form shoulders or offsets, against which the heads are to rest." Waiving the question whether this feature of construction in a sheet-metal can could be the subject-matter of a patent, it is sufficient to say that we do not find this feature in the cans used by any of the defendants, while the complainants' cans put in evidence show that they do not confine themselves to this form of construction. All the defendants' cans which are shown as exhibits in the case are made by turning a rim of the head down over the outside of the body or shell of the can and fastening the head in place with solder, and none of them have the "offset" ends called for by the specifications of this patent; and, as we have already said, this seems to be the form of construction practically adopted by the plaintiffs, probably because all packers find they can make a can just as tight and useful, and more cheaply, by turning the head over the outside of the shell, than by following the exact description of the patent. But we also find, in the proof, that the cans shown to have been used by Gibbie and by Perl, as early as 1872, show the offset ends claimed by this patent. The "Gibbie" can has both the "rounded corners" and "offset ends," while the "Perl" can has "offset ends" as a distinctive feature of construction. We have, therefore, conical and pyramidal-shaped cans, and the "Gibbie" and "Perl" cans, with flat sides, but rounded corners and offset ends, known and in use long before this inventor entered the field, and feel compelled to reach the conclusion that there was no novelty in the device of a pyramidal-shaped can with rounded corners and offset ends, as described in this claim. So that it seems clear to us that the first claim of this patent must be held void for want of novelty.

As to the third claim the proof shows that Marshall packed meat solidly in a can in 1864. He says:

"I then subject a given quantity of the meat to pressure in a box or cylinder until all air is driven out, and the space occupied by the meat agrees with the size of the package it is intended to fill. When the meat is in its place the box is hermetically sealed, and in this state, retaining all its nutritive qualities, the meat will remain perfect as long as the package remains intact."

So Lyman, in his patent of 1870, described his process of packing meats solidly in cans as follows:

"I grind or otherwise reduce the roughest parts to about the consistency of thick mortar or putty, and then pack the best pieces in this reduced meat and press it all into a compact mass in the can, the interstices being filled with the reduced meat firmly pressed in, so as to expel the air, instead of filling them with the gravy or with water, as by the common modes. Sometimes I grind

the whole of the meat and pack the can with it, compressing it into a solid mass, then heat and seal it up from the air, and reheat it to combine any free oxygen that may possibly be left in the can."

Here we have in both cases solid meats, and in one case cooked meats, packed in cans for preservation. Neither of these patentees tell us the shape of their cans. But we cannot see how, with conical and pyramidal cans well known in the art as packages for the preservation of meats and other food, and the old art of packing or compressing meats solidly into cans, there can be any invention which should be protected by a patent in taking these well-known shaped cans and pressing into them cooked meat so as to form a solid mass or cake. The can was old and the meat cake was old.

The result is that the bills will be dismissed.

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### HERRING v. GAS CONSUMERS' ASSOCIATION.\*

(*Circuit Court, E. D. Missouri.* March 28, 1878.)

#### 1. INFRINGEMENT OF PATENT BY JOINT OWNER.

A part owner of a patent has no right to use an infringing device. If he does he is liable to his co-owner for the wrong done.

#### 2. SAME—AMOUNT OF RECOVERY.

When a part owner of a patent sues a co-owner for using an infringing device, the recovery, if any, will be in proportion to their respective interests.

In Equity. Demurrer.

*J. H. Blair*, for plaintiff.

*H. B. Wilson and John McGuffy*, for defendant.

TREAT, D. J. The plaintiff avers, substantially, that he is owner of an undivided two-thirds interest in the patent described, and that the defendant is owner of the other undivided one-third interest; that the defendant is using a device which is an infringement upon their common patent, and that he is so doing under cover of their common patent. Hence the claim for damages for said infringement,—not for the entire amount thereof, but for plaintiff's proportion, to-wit, two-thirds.

The direct question presented is whether an infringer of a patent can escape liability for his infringement because he is a joint owner of the original patent upon which the infringement occurs.

The cases cited do not reach the precise point raised by the bill. It is evident that if a stranger was guilty of the infringement he

\*Published by request.

would be compelled to respond in damages. Can a part owner infringe the common patent and escape all liability? If he can, it is obvious that, however small his aliquot part, he can make the enjoyment of the patent valueless to his joint owner. He has, by virtue of the joint ownership, a right to use the patent, but he has no right, more than a stranger, to infringe the same. If there is an infringement the right of recovery is in the party wronged. All the joint owners should ordinarily be parties plaintiff, but if the wrong-doer is one who is guilty to the damage of the other joint owner, the latter should not be left remediless. As to such infringement they are strangers. All the joint owners are on the record, and the amount of the recovery determines their respective interests. The infringer cannot escape the consequences of his wrong to his joint owner by averring that he was by his infringement injuring not his joint owner alone, but himself also. In other words, he cannot, *under cover* of his interest in the common patent, shield every wrong-doer who may infringe that patent. He can, as to the other part owners, by infringing, become liable to them for the wrong done. The amount of recovery will be in proportion to their respective interests. Were this not so, the door would be open to the grossest frauds by one joint owner against all other joint owners.

The case of *Pitts v. Hall*, 3 Blatchf. 204, and the comments thereon in Curtis, Pat. § 108 *et seq.*, do not cover this case. The question there discussed pertains to the use by one joint-owner of the common property. The difficulties in maintaining an action for an infringement against a joint-owner who merely uses the common patent may be insurmountable. As to that no opinion is expressed. In this case an entirely new and distinct proposition is presented, viz.: one of the several joint owners is not using the common patent, but an infringing patent. His defence is that inasmuch as he had a right to use the original patent without question from his joint owners, despite the decision in *Pitts v. Hall*, *supra*, he has a right also to use any infringing patents, on the ground that his right to use the original, being vested in him, his use of other and infringing patents did not cause any wrong or injury to himself as joint owner. In other words, the defendant contends that as one joint owner he could use the common patent without being liable to account to the other joint owners; that he could not be sued as an infringer for using what he had a right to use by virtue of his proprietary interest; and therefore, if he used an infringing device, he was only injuring himself in what he had a proprietary right to forbid.

This would be correct if no interest except his own were involved, for a man may do what he pleases with his own, and "*volenti non fit injuria*" would be, *a fortiori*, applicable in such a case. If a stranger were using the infringing patent this action would unquestionably lie against him; and the question before us is whether it will lie against a joint owner, or, in the language of the bill, whether he, under cover of his joint ownership, can infringe and escape liability. So far as he acts outside of his interests or rights or powers as a joint owner there is no adequate reason for treating him, *quoad hoc*, otherwise than as a stranger. If this be not so, then one joint owner may destroy, without remedy, the rights of the other joint owners.

Demurrer overruled.

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NAT. FEATHER DUSTER Co. v. HIBBARD.

(Circuit Court, N. D. Illinois. November 26, 1881.)

1. LETTERS PATENT—FEATHER DUSTERS—REV. ST. § 4918—INTERFERING PATENTS.

Letters patent No. 177,933, dated May 30, 1876, and issued to Susan M. Hibbard, for an improvement in feather dusters, held to interfere with letters patent No. 154,985, and set aside.

2. ESTOPPEL.

Under the circumstances, Susan M. Hibbard is estopped to deny that her husband was the inventor of the device in controversy.

3. INVENTOR.

One who made a valuable suggestion to the conceiver of the idea of substituting, in a feather duster, feathers of the common domestic fowls in place of ostrich feathers, while he was engaged in a series of experiments with a view to discover some means whereby such feathers might be made pliable, did not, thereby, become the inventor of the duster.

*Sleeper & Whiton*, for complainant.

*West & Bond*, for defendant.

BLDGETT, D. J. This is a bill in equity, framed under section 4918 of the Revised Statutes of the United States, for the purpose of setting aside and declaring void a patent issued by the United States to Susan M. Hibbard, for "an improvement in feather dusters," dated May 30, 1876, and numbered 177,933, upon the ground that the patentee, Susan M. Hibbard, was not the inventor of the device described in and covered by the patent.

The complainant claims to be the owner of patent No. 154,985, issued by the United States, on the fifteenth of September, 1874, to

William H. Curwin, Charles J. Sauter, and William W. Clark, as assignees of George W. Hibbard, for an "improvement in feather dusters," and charges that George W. Hibbard is the husband of the defendant Susan M. Hibbard, and that after the said George had made the invention described in the letters patent No. 154,985, and before the issue of his patent, he sold and assigned his invention, and his right to a patent thereto, to the parties named therein, to-wit, Curwin, Sauter, and Clark, and the patent was duly issued to them as assignees of George W. Hibbard; and that after said George W. had made the invention described in his patent, and sold the same, as stated, he and the said Susan M., his wife, colluded together to obtain the letters patent which were issued to said Susan upon the pretext and false assumption that said Susan was the real inventor of the device covered by the first-issued letters patent. And the bill prays that the patent so issued to said Susan M., in violation of the exclusive rights of the complainants in the invention therein described, may be cancelled and set aside.

The peculiar feature which characterizes both these patents is a feather duster made of turkey feathers, or the feathers of our ordinary domestic fowls adapted to such purpose, made pliable by removing the pithy part or body from the stem of the feathers, so as to adapt the feathers more perfectly to such use, when combined with the other elements to form a duster or brush.

The proof in this case shows conclusively that Mrs. Susan M. Hibbard knew of the fact that her husband had applied for a patent upon this device; knew, also, that he was poor and unable to pay the expense of obtaining a patent, and that he made the bargain with Curwin and Sauter to advance the expenses and obtain the patent on condition that they should become half-owners thereof. She also knew of the negotiations between her husband and Clark for the sale of the other half of the patent, and made no objection to the negotiation, and knew that her husband was to receive what was considered very liberal pay for the remaining half of the patent, and the only objection she ever made to the negotiation was that she insisted that the purchase money to be paid by Clark should be given to her—not because she was the inventor, or had anything to do with the invention of the duster to be covered by the patent, but because her husband, being an improvident man, would squander the money which she wished to use in the purchase of a home for the family. During all the negotiations between her husband and Curwin and Sauter, and her husband and Clark, she never claimed or pretended, or by

any conduct on her part insinuated, that the invention was in any degree her own, but allowed these men to invest their money in the procurement of the patent, and Clark pay for the unsold half of the patent, upon the understanding—to which she seems to have been as fully a party as her husband—that he was the inventor of the duster to be covered by the patent. It seems to me that the proof shows that Mrs. Hibbard, in allowing her husband to deal with Curwin, Sauter, and Clark as the original and first inventor of this device, has so far conceded or admitted him to be the original inventor thereof as that she should be estopped from now claiming otherwise, and especially claiming that she, and not her husband, was the inventor. If there were no other features in the case, therefore, than the conduct of Mrs. Hibbard towards the persons with whom her husband dealt, I should think it enough to cancel this patent as against the patent previously issued to him.

But the case is, perhaps, susceptible of solution upon another ground. It appears from the proof that George W. Hibbard, for some time prior to the alleged invention described in his patent, had been engaged in the manufacture of dusters from turkey feathers, by setting them in their natural condition into a handle so as to make a brush or duster; that some little time prior to the tenth of February, 1874, he conceived the idea of making a better duster by softening the stems of turkey feathers and rendering them more pliable, so as to make a feather duster which would supersede or take the place of dusters then and theretofore made from ostrich feathers,—his idea being that, if he could make turkey feathers, or the feathers of our common fowls, pliable, he could use them in place of foreign feathers, and make as good, if not a better, duster. He experimented some time in this direction, with chemicals, for the purpose of softening the stem or rib of these feathers, and not succeeding to his satisfaction in any of these experiments, was discussing the subject on one occasion with his wife, when she suggested to try cutting or shaving down the stem of the feathers, so as to make them pliable and limber. The suggestion was at once acted upon, and a duster made which proved satisfactory, and the patent issued to his assignees was obtained for this device as the invention of George W. Hibbard.

Mrs. Hibbard's sole claim to the invention covered by her patent, which is the same as that covered by the patent of her husband, is that the suggestion or idea of cutting or trimming these feathers down, so as to make them limber, first came from her, and upon this fact she claimed and obtained the patent in controversy.

The specifications and claims in the two patents are substantially the same, and are for, "as an improved article of manufacture, a feather duster having the stems of the feathers split longitudinally, and a part thereof severed from the remaining part, substantially as specified."

The patent, it will be seen, is for this new article of manufacture, namely, a feather duster made of split feathers. It is not upon split feathers as such, or upon the process of splitting feathers, but upon a combination of the split feathers with the other elements by which a duster is made. The idea of a feather duster, to be made of feathers of the common turkey or other domestic fowls, seems clearly to have originated with George W. Hibbard. The *desideratum* was to make those feathers pliable. He was seeking to accomplish this when the suggestion was made to him by Mrs. Hibbard to try cutting or splitting them. The proof on the part of Mrs. Hibbard fails to show, indeed it falls far short of showing, that she ever made a feather duster, or thought of making one, from turkey feathers made pliable by splitting them, until after her husband had been for some time at work in that direction. The most the proof does show is that she suggested the mode of making feathers limber and pliable which were used for the purpose of making the feather dusters described in this patent. The successful feather duster, covered by both these patents, was, it seems to me from the proof, the invention of George W. Hibbard. While he was experimenting—I may say, perhaps, groping—for some method of rendering his feathers pliable, Mrs. Hibbard suggested the experiment of splitting the feathers. He acted upon that suggestion, and finding that the feathers were thereby made pliable, combined them with the other material, and made the feather duster which, before that time, had only had existence in his mind. Although Mrs. Hibbard may have made a valuable suggestion in the progress of the experiment, yet that does not make her the inventor. *Agawam Co. v. Jordan*, 7 Wall. 602; *Pitts v. Hall*, 2 Blatchf. 229.

For these reasons, but mainly upon the ground of the estoppel, which I think the most cogent, the bill of the complainant will be sustained, and a decree entered setting aside the patent issued to Susan M. Hibbard.

## MURRAY v. WHITE and another.

*(District Court, D. Maine. December 5, 1881.)*

## 1. PUNISHMENT OF SEAMEN.

A subordinate officer is not justified in punishing a seaman for an offence which the master has condoned; and the master is liable, also, if he allows the punishment to be inflicted in his presence.

*Mr. Hale*, for libellant.

*Mr. Hadlock*, for White.

*Mr. Webb*, for Hoffses.

Fox, D. J. The libellant was a seaman on board the ship *Lewis Walsh* on her late voyage from Liverpool to Portland, and has instituted this action against the master, White, and the mate, Hoffses, to recover damages for personal injuries by him sustained, on the fourth day of August last, from a pistol wound inflicted upon him by the mate in the presence of the master, and with his sanction and approval.

The libel sets forth, with great aggravation, that the libellant was in the mate's watch, and soon after 8 o'clock of the morning in question the watch was set to work scrubbing paint; that the mate put the libellant to work cleaning in front of the cabin; that the master afterwards directed him to clean on the port side near the pin-rail; shortly after, the mate ordered him to go on top of the cabin and clean the bucket-rack; this order was soon countermanded by the master, and the libellant returned to the deck; that the captain told him to go to his work, "you d— s— of a b—," to which he made answer "that he would go to work, but he was not a s— of a b—," when the mate came up, repeating the same profane and vulgar language the captain had used, and thereupon the mate struck him on the side of the head with his clenched fist, again using the same words to him as before; that the mate jumped back and put his hand behind him as though he would draw some instrument from his back pocket, saying, "Now come on, you s— of a b—, come on," and thereupon libellant drew his knife from his sheath and held it down by his side, but so that it might be seen by the mate. This knife, it is alleged, was an old kitchen knife, with a short, broken blade. The mate then ran towards the pin-rail for a belaying-pin, and afterwards got one from the fife-rail, the libellant following him and getting a pin from the pin-rail, after putting his knife down on the rail; that the mate went into the cabin and soon came out with a drawn revolver and club in his hands; went up to libellant, who was then at work in front of the cabin, and struck him with the club on his arm, which he raised to ward off the blow, and threatened to put a bullet through the head of libellant, and while on the deck, where he had fallen by reason of the mate's blow from the club, the mate fired at him, the ball striking in front of the shoulder, and is now lodged near the shoulder-blade.

The captain and mate, in their answers, deny that the libellant was sent upon



the house to clean the bucket-rack, or that any such foul and profane language was at any time spoken to Murray by either of them. The mate alleges that the libellant was directed by the master to do his work better, to which he replied that he would not clean any better for any one, and thereupon the mate ordered libellant to go on with his work and stop his talk, to which libellant answered insolently, and the mate then slapped the libellant on the side of his face, with his open hand, telling him to keep on with his work and have no talk; that libellant immediately drew his sheath knife and came instantly towards the mate, who turned and fled towards the fife-rail, pursued by Murray with his drawn knife, until the mate got a pin from the fife-rail, when Murray turned and took a pin from the pin-rail, and then turned towards the mate with both knife and belaying-pin in his hands; that the captain ordered libellant to put back the pin and go to his work, which he did; that respondent then went into the cabin and took from his trunk a loaded pistol, which had been loaded for a long time; leaving the pin in the cabin, he came out on deck and inquired of Murray if he intended to cut him with that knife; that he said and did nothing more, had no intention of shooting or injuring libellant, but expected that when Murray saw respondent armed and prepared to resist any attack with the knife, he would disclaim any purpose to use the knife upon respondent, and would, without trouble, thenceforth obey the commands and directions of respondent, but that, contrary to his expectations, libellant suddenly and instantly again drew his sheath knife, and with it drawn sprang instantly and threateningly towards the respondent, who sprang back, and finding the libellant still pressing on him with the drawn knife and endangering his life, as he then believed, did then and not till then, for the purpose of protecting himself, raise and fire the pistol at Murray's arm, and not at any vital part, and that the shot took effect in his shoulder; that he did not strike him with a club before firing at him.

The answer of the master is corroborative of the mate's, and alleges that when the mate came out of the cabin he did not anticipate any assault upon libellant by the mate, and that the discharge of the pistol was so quick that he had not time to prevent it.

Besides the libellant, three others of the watch have been produced as witnesses in his behalf; two of them at the time were employed in paint cleaning near to Murray, and the other was at the wheel. These witnesses have for some time been detained in the jail in this city as witnesses for the government, in the prosecution of the mate for this assault, and have had the opportunity of perusing or listening to a written version of these proceedings prepared by Murray, who appears to be a ready penman, and of more than the ordinary intelligence of a common sailor. The statement of these witnesses, in all essential particulars, is but a repetition of Murray's testimony; all agreeing that the foul and profane language was used by both captain and mate, and that the mate came out from the cabin with his pistol and club, and struck Murray with the club on the arm and immediately fired at him.

In addition to the testimony of the respondents, they have examined the second mate, cook, steward, and two passengers. They all deny that any such language was made use of by either of respondents as is charged in the libel; and there is a like conflict with the libellant and his witnesses as to the mate

striking the libellant with a club after he came from the cabin. One of the passengers thinks the mate had a club in his hand, but he is sure that the mate did not strike the libellant with it; and all the other witnesses for respondents assert that when the mate came from the cabin the only thing in either hand was his revolver.

The version of this affair given by libellant and his witnesses is so unreasonable as to demand confirmation, before a court accustomed to listen to the statements of seamen, as to transactions of this description, would be likely to place entire confidence in its correctness. It is hardly credible that, without much greater provocation, both master and mate would pour out such a tirade of vulgarity and profanity upon a sailor, with whom neither of them ever before had the least difficulty, each of them using the same disgraceful epithets; and it is alike incredible that, when the seaman had returned to duty in obedience to the orders of the master, that the mate, without further provocation, would, in the master's presence, so violently assault the seaman with a club, following up the blow by a pistol shot, without any demonstrations on the part of the seaman. After a careful perusal of all the evidence, the court is forced to the conclusion that the testimony in support of the charge is so highly perverted, so exaggerated, and so colors and misrepresents the facts as they occurred, that a court of justice would not be authorized to give credit to it, excepting when it is sustained from other sources.

More than 40 years have elapsed since Judge Story, in *U. S. v. Taylor*, 2 Sumn. 584, declared—

“That subordinate officers have no authority to punish a seaman when the master is on board, unless such punishment is absolutely required at the very moment, by the necessity of the ship's service, to compel the performance of duty, and that the master was generally the sole authority, when on board, to authorize punishment to be inflicted on any of the crew; and if he is present when any punishment is inflicted by a subordinate officer, and can prevent it, and does not, he is personally answerable for the act, and by his acquiescence adopts it as done by his authority.”

At a much earlier date, Judge Ware, in this district, had on repeated instances enforced these rules in controversies of this description. They commend themselves to every judicial mind as just and reasonable, requiring the master “to exercise his own judgment as to the time, the manner, and the circumstances under which punishment is to be inflicted on the crew for any past misdemeanor, or any present misdemeanor, not immediately and materially affecting the ship's service or security.” So far as these rules are found applicable to the facts here established, they must control the judgment of the court.

Upon a revision of all the testimony, the court finds the occurrence to have been substantially as follows:

While the libellant was at work cleaning paint, the master, in a proper manner, directed him to do his work better, to which the seaman made an impertinent reply. Thereupon the mate, without any appeal from the master, came up, told the man to stop talking, and do his work as the captain told him. Instead of complying with this direction, he was insolent to the mate, who thereupon slapped him on the side of his face with his open hand. The libellant then drew his sheath knife, of the usual size, stepping towards the mate, who ran for a belaying-pin, followed by Murray. Each procured a pin, Murray still holding his knife in his hand. The mate then ran into the cabin with the pin to obtain his revolver. He soon after came on deck, with his pistol partly raised and in plain sight, but without any club or pin. After Murray had procured the belaying-pin he was, in the presence of the mate, ordered by the master to put the pin back in its place and return to his work, which he did before the mate went into the cabin. When the mate came from the cabin he went near to the master and up to Murray, who was then quietly at work as ordered, and, with the pistol raised and presented at Murray, inquired of him if he intended to cut him with his knife, which was then in its sheath. Thereupon Murray drew the knife from its sheath, and at the same time the mate fired and wounded the libellant.

Will the law sanction the action of the mate? In the opinion of the court it will not. The libellant's insolent reply to the civil command of the master would have clearly authorized the master to have inflicted reasonable punishment, either by his own hands or by the mate, if the master thought proper so to direct; but no such direction was given, and the mate, without authority from the master, interfered and repeated the master's orders to Murray, who again repeated his insolence; thereupon the mate struck Murray with his open hand in the face. In all probability the blow was of but slight moment, but, as the master was then present, within the rule of law the mate was not authorized to punish the seaman, although he had been insolent and disobedient. There was no immediate exigency of the service which called for such exercise of authority by the mate; and, although Murray deserved punishment for his misconduct, it should have been imposed by direction of the master, who was the proper judge as to the occasion and severity of the punishment, as the misconduct of the seaman had occurred in the presence of the master.

After the blow on the face Murray drew his knife on the mate, stepping forward towards him, who was wholly without means of protection. This act of Murray was an offence of the gravest nature, although in the opinion of the court it was not Murray's design to

strike the mate with the knife unless the mate renewed the assault. When the mate discovered the knife in Murray's hand he was well justified in obtaining a belaying pin with which to defend himself, and Murray was without excuse in pursuing him and procuring a similar weapon. He then had his knife, which was all the means of protection he could need, even if the mate should renew the assault upon him with the pin. Up to the moment when the captain ordered Murray to put down the pin and go to his work, his conduct was wholly without justification or excuse, as the assault upon him by the mate with his open hand would not justify his use of the knife, even if he had reason to suspect that the mate might repeat the blow, as by such a blow no great personal injury could be inflicted, which would alone authorize the use of a deadly instrument in defence. Thus far the libellant was substantially the wrong-doer; but from this stage the court finds the mate's conduct was inexcusable. In his answer he says—

"That the libellant, with the knife in one hand and the belaying-pin in the other, turned towards the respondent, when the captain ordered him to put back the pin and go to his work, which he did, and respondent went at once to his cabin."

The mate thus admits that the libellant had returned to his duty, and the mate, therefore, was without excuse for the subsequent assault on Murray.

The mate is but 22 years of age, and, of course, with no long experience in that capacity. He acknowledges he was greatly excited by Murray's conduct, and well he might be; but after Murray's prompt obedience to the master's command, the mate should have restrained his anger and excitement, and if Murray was deserving of punishment for his misbehavior, as the court most decidedly thinks he was, it should have been imposed by authority of the master, with calmness and deliberation, and in such a manner as to insure obedience from all the crew, and not in the manner adopted by the mate.

When Murray had peaceably returned to his duty, and was at work in obedience to the captain's orders, the mate rushed at him with his pistol raised, inquiring of him "if he intended to cut him with that knife." The knife was not then visible, but at sight of the revolver pointed at him by the mate his knife was drawn by Murray, and at the same time the mate fired and wounded Murray. The mate testifies that in presenting his pistol at Murray "he hoped the sight of it would enforce order." Such an excuse is probably an after-

thought, as there was, when he came from the cabin with his pistol, perfect order and obedience from the libellant, and, so far as is disclosed, from every other seaman on board.

It is claimed that the inquiry made of Murray by the mate, when he presented the pistol, was as to his intentions to use the knife thereafter, and not as to what had been his former purpose. The court is not satisfied that such was the purpose of the inquiry, but, on the contrary, is inclined to the opinion that, when the mate came towards the sailor with his pistol, his purpose was to call him to account for what had already taken place. The witnesses in defence do not all agree exactly as to the precise language of the mate. He says he inquired of him "if he was going to stick the knife in me." The captain states it, "Do you intend to put that knife into me?" The version of the cook and of the steward is that he asked him "if he meant to cut him with the knife." And such is substantially the statement of both the passengers; while the second mate testifies the language was, "You drew a knife on me." The log gives it that the mate inquired of Murray "if he intended to cut him;" and such is the averment in the answer. The language of most of these witnesses, excepting the second mate, with the written statements, is certainly ambiguous, and may admit of either construction; but when the condition of things, as they then were, are taken into consideration, it would seem clear that Murray's future intentions as to the use of the knife would not be a matter of inquiry.

At that moment there was no knife in sight. It was concealed in its sheath, which was under the clothing of Murray; and the seaman, instead of in any way indicating any purpose of renewing the quarrel and using his knife, was in the discharge of the duties to which he had been ordered by the master. The mate, therefore, had no reason whatever to expect further trouble, or that the man would resort to his knife; and had no occasion whatever, therefore, to inquire what the intentions of the libellant might be in the future, while, on the contrary, Murray having just before that drawn the knife when assaulted by the mate, he might well inquire if he had then intended to cut him with that instrument.

The court, therefore, has no doubt that the mate approached Murray, with his pistol raised, ready to fire, with the object of calling him to account for his past misconduct, and this he had no authority to do in the presence of the master, especially as he had been an eye-witness of Murray's behavior, and apparently condoned his misconduct by ordering him back to his duty.

It is argued with great zeal, by the learned counsel for the mate, that he had retreated from the sailor in presence of the crew; that his authority had been set at naught; and that to maintain proper discipline he was justified in what he did; that he had no intent to wound the man prior to his drawing his knife; that his design was, by exposure of the pistol, to let all the crew understand that he was prepared to defend himself, and to maintain his authority; and that he expected Murray would thereupon disclaim any intent to use the knife, and would obey his orders. The testimony does not satisfy the court that such was the motive of the mate; but if it were admitted that such was his object, in the manner he undertook to accomplish it he transcended his authority. He was without directions from the master so to act, and it was for him alone to take the proper measures for maintaining the discipline of his ship. It was not for the mate, after the seaman had returned to his duty, to approach him violently, in a threatening manner, with a loaded pistol presented, and demand of him as to his purposes for the future, unless directed so to do by the master.

Pointing at Murray the loaded pistol, thereby putting him in fear and alarm, was in law an assault. *Regina v. St. George*, 9 C. & P. 483. The mate was the aggressor in thus renewing the quarrel, and under the circumstances was not justified in shooting the libellant if he had first drawn his knife from the sheath.

The master answers that everything took place within so short a period of time that he had no opportunity to prevent the mate from making the assault. The master had witnessed the whole transaction; must have seen that the mate was in an excited condition, angry with Murray, when he rushed with the belaying-pin into the cabin. When he came from the cabin the pistol was in plain sight, seen by all the other witnesses, and the court has no question that the captain was aware that the mate had procured it, and that he must have seen it in the mate's hands, as he passed near to the master as he approached Murray. Seeing this deadly weapon presented at the sailor by the mate, which had been obtained by him immediately after the difficulty with Murray, it was the imperative duty of the master to have interfered and ordered the mate to refrain from further violence. If such had been his conduct, there can be but little question that the mate would have obeyed the master's commands and no further trouble would have occurred. Instead of so doing, he abstained from all interference, permitted the mate to rush at the seaman with the dangerous weapon levelled at him, and the master

must in law be held accountable for damages occasioned by the mate's misconduct.

Under all the facts of the case this libellant presents himself as in the outset greatly in the wrong, and he is entitled only to a reasonable indemnity for his expenses, suffering, and loss of time. His wages were paid him to the time of his arrival, although he was not on duty after he was shot, and he has been detained without expense as a witness for the government in the criminal proceedings against the mate, and will receive the usual allowance. It does not appear that he was at any expense for physicians or otherwise. His wound healed shortly after it was inflicted, the ball being lodged in the muscles, so near the surface that the physician called by the libellant testifies that it can be easily removed, the wound healed in a week, and the party entirely cured and ready for duty as a seaman in a month, without doubt; and it is fortunate for all parties that the wound thus inflicted is of so trivial a character.

In *Elwell v. Martin*, 1 Ware, 53, the injury sustained by the libellant was more severe than Murray's, there being a dislocation of the arm, which remained in that condition 14 days and was reduced with great suffering and difficulty, and it was in proof that it would be some months before the party could recover the use of his arm, and that it would always remain more liable to such an injury. In that case the libellant had been guilty of misconduct, which in some degree influenced the judgment of the court in awarding the amount of damages, which were fixed at \$80. I think that Murray may well be satisfied with a similar amount, and it is so decreed.

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### THE VESPER.

(District Court, S. D. New York. December, 1881.)

#### 1. COLLISION—SPEED OF SAILING-VESSEL—LOOKOUT—OBSCURATION OF LIGHTS—THIRD AND EIGHTH RULES OF NAVIGATION.

Where the steam-propeller V. collided with the schooner J. J., in the evening of October 7, between Bedloe's island and Robbins' reef, in New York harbor, striking her on the port bow, and the J. J. had been sailing at the rate of eight knots an hour, with a strong flood tide, on a N. E. course, with the wind nearly free, until just before the collision, when she for the first time saw the V., and then ported to avoid the collision, but had not seen her lights, nor those of another steamer near the V., both being long in sight,—

*Held*, that the failure of the J. J. to see the other lights was due to her not keeping a proper lookout.

*And further held*, that had there been, as claimed, a fog so dense as to obscure the V.'s lights, it would have been, under the circumstances, carelessness in the J. J. to sail at such speed where she was likely to meet other vessels; that the momentary appearance and disappearance of the red light of the J. J. several times in succession, as seen from the V. before the collision, the green light being constantly in view, was not caused by the fluctuations in the J. J.'s jib shutting out the red light, but to unsteadiness in her navigation.

*And further held*, that had the J. J. been approaching head on, as claimed, and had the red light been continuously hidden by the jib, as claimed, except the momentary fluctuations just before the collision, the V. could not be charged with fault in not avoiding the J. J., and it would have been the fault or misfortune of the J. J. in not complying with rules 3 and 8, Rev. St. § 4233, regulating the lights on vessels, (*Hoben v. Westover*, 2 FED. REP. 91, distinguished;) that the V. was not in fault, but the collision was wholly due to the J. J. changing her course in the confusion occasioned by her failure sooner to see the other's lights, and by her careless navigation.

**In Admiralty.**

*Alexander & Ash*, for libellants.

*Owen & Gray*, for claimants.

BROWN, D. J. This libel was filed to recover damages received by the schooner John Jay, on the evening of October 7, 1878, in a collision with the steam-propeller Vesper, in the upper bay, at a point about half way between Bedloe's island and Robbins' Reef light.

The schooner was of 39 3-5 tons register, bound from Tottenville to the North river, New York, without cargo, and after leaving the kilns was heading for the battery lights, upon a course about north-east. There was a strong south-east wind, and the tide was flood, under which the schooner was making about eight knots per hour. She had on board a captain, mate, and deck hand, and, according to their testimony, she was sailing about three points free, and kept her course unchanged after leaving the kilns, heading for the battery lights, until she was passing the edge of the flats between Bedloe's island and Robbins' Reef light, and was about entering the deeper water of the ship channel when her captain, who was at the helm, saw for the first time the steamer Vesper, as he says, not over half her length (about 25 yards) distant, coming head on directly upon him, and a little over his port bow. He testifies that he immediately ported his helm to avoid being split open, and that his vessel had only time to swing some two or three points to starboard when she was struck by the Vesper's bows between her main chains on the port side, cutting her to within about two inches of the water's edge, breaking two of her deck plank, and making a hole about four feet long by two feet deep. The Vesper is a steam-propeller, 150 feet long, of 331 tons register, drawing, loaded, seven and one-half feet of water, and plying regularly between New York and Wilmington, Delaware, by way of the Delaware and Raritan canal. She left pier 13, East river, New York, on the seventh of October, upon one of her usual trips, at about 7 o'clock in the evening, with all her proper lights burning brightly. After clearing Governor's island, going less than a half mile to the westward of it, she pursued her usual course in the ship channel down the bay, upon a south-west course, keeping Robbins' Reef light about one



point to starboard. Her captain was alone in the wheel-house, until shortly before the collision, when the mate came to his assistance. They testify that the night was a cloudy, moonlight night; that when off Bedloe's island the John Jay was first seen showing her red light about one point, or thereabouts, off the Vesper's starboard bow, estimated to be about a mile distant; that after a little while her red light was shut in and her green light appeared, when she was judged to be 400 or 500 yards distant, whereupon the wheel of the Vesper was put to starboard to keep off; that after sailing from one to two minutes with only her green light visible, and being then about two points off the Vesper's starboard bow, her red light appeared momentarily, and then disappeared three times in succession, at very short intervals, all occurring within some few seconds, the green light being all the time in view; that immediately upon this reappearance of the red light two whistles were blown, and the wheel put more to starboard; that the John Jay thereupon ported her helm, luffed up and showed her red light, shut in her green light, and ran directly across the bows of the Vesper; that the John Jay, when she ported, was some 200 yards distant and some 50 yards to westward, (as I interpret the testimony,) and when the Vesper, still standing off from her, would have cleared her by some 50 to 100 yards, if her course had not been changed; that her porting occurred within five seconds of the reappearance of the red light, and that the captain of the Vesper immediately rang four bells to slow, stop, and reverse, which were immediately obeyed, and that she was nearly stopped when the collision occurred; that the porting of the helm was from one minute to a minute and a half before the collision, and that the Vesper could then do nothing more to avoid the John Jay, and that the collision was owing solely to the latter's change of course.

The engineer of the Vesper testifies that he felt the touch of the collision; that he then had the engine backing for about a minute at least, 65 revolutions backward; and that as she was going that night the Vesper's headway would be stopped in a minute and a half. The cook of the John Jay also confirms the statement that the Vesper was nearly stopped.

At the time of the collision the steam-propeller Mayflower, with a barge in tow, was some 400 or 500 yards astern of the Vesper, and about 100 yards to the eastward. The Vesper had passed her about 50 yards to the westward, a little below Bedloe's island, some 10 minutes before the collision, and they were proceeding in nearly parallel courses. The captain of the Mayflower testified that he saw the red light of the John Jay when off Bedloe's island; saw her afterwards shut in her red and show her green light; that being a little further to the eastward he did not see the momentary appearance and disappearance of the red light afterwards, as testified by the captain of the Vesper; that after the red light was shut in, her green light alone showed continuously until shortly before the collision, when he saw the John Jay port and shut in her green light and show her red light solid; that at the time the John Jay ported he could see the opening between her and the Vesper; that she was inside of the Vesper's course and nearly 100 yards to the west of her, and that she would have gone 50 to 100 yards clear of the Vesper if she had not ported; that he heard the bells of the Vesper to stop and back, and that her lights were all the time burning brightly.

The deck hand of the John Jay (colored) states that he was forward, on the lookout; that he first saw the low light of the Vesper about 100 yards off, and that he stepped to windward and asked the captain if he saw the light ahead, saying, "You are steering directly for it;" that he got no answer, but did not then think there was any danger of a collision; that he saw no colored lights of the Vesper, or of any other vessel. The cook, who says he was on the deck of the John Jay, testifies that he saw no lights of the Vesper, or of any other vessel, and the captain says the same. The cook says he saw the Vesper's bow 200 yards off; that the captain saw her first, and immediately ported. The captain says he first saw the Vesper when only half his length off, (25 yards,) and that he saw her because he happened to stoop down, as is his wont, and look under the boom.

The libellant seeks to explain this failure of all aboard the John Jay to see the lights, either of the Vesper or of the Mayflower, by claiming that a low fog hung over the water, which obscured the vision of persons so low down as those on the deck of the John Jay, while the vision of those upon the steamer's decks was not so obstructed. The testimony does not sustain this argument. The deck hand of the John Jay, as well as the witnesses from the other vessels, testify that there was no fog. Had there been any such fog as to prevent the lights being seen within a short distance, it would have been gross carelessness in the John Jay to have been sailing at the rate of eight knots an hour where other vessels were liable to be encountered. But the evidence is that there was no fog or obscuration of the lights. The lights of the John Jay were seen from the Vesper and the Mayflower at least a mile away, and they testify that lights of vessels could easily be seen that distance; and the gas-lights of the battery are alleged by the cook of the John Jay to to have been visible after leaving the kilns, which is at least five miles off.

I am forced to the conclusion, from the whole testimony, that the John Jay not only had no proper lookout, but that the captain, who was at the wheel, was also grossly negligent in not observing what vessels were near his course, and careless in navigating his vessel. He was sailing, as he says, at the rate of eight knots an hour, and the tide was with him. He had been coming across the flats from the mouth of the kilns, where only a few light-draught vessels pass, and where he might naturally be less observant. He arrived in the deeper water of the channel, doubtless, much sooner than he was aware of, and he had also gone far more to the eastward than he supposed. He testifies positively that, from the time of leaving the kilns, he steered straight for the battery lights. Had he done so this collision could not have happened. That course would have put him, when half way between Bedloe's island and Robbins' Reef light, still upon the flats, and nearly a quarter of a mile to the west of their easterly edge. He testifies, however, that "at the time of the collision we had just got off the edge of the flats," while the actual place of collision, as shown from the course of the Vesper, viz., S. W., after clear-

ing Governor's island, keeping Robbins' Reef light one point to starboard, must have been fully a quarter of a mile to the east of the edge of the flats, or a half mile to the windward of the course which the captain says he took and kept after leaving the kilns. As the mouth of the kilns is but two miles distant from the place of collision, a deviation of half a mile to windward in so short a distance could only arise from very careless navigation, as well as careless observation.

If, from the time of leaving the kilns up to the time of porting, just before the collision, the John Jay kept a steady course unchanged, as her witnesses testify, then the change from her red light to her green light, some considerable time before the collision, which the witnesses from the Vesper and the Mayflower all assert, would show that the Vesper had already passed the point of intersection of the courses of the two vessels, as there is no claim that the Vesper had, before that time, changed her course, and there was no occasion for her doing so.

The claim that the John Jay was all the while really heading for the Vesper, but that her red light, after a time, became permanently hidden behind her jib, except as it momentarily appeared and disappeared three times from the fluctuations of the jib, is not consistent with all the facts, and would not, in my judgment, even if true, entitle the libellant to recover. Had the John Jay's course been steady, and the red light been first obscured by the jib only as the Vesper was passing to windward of her, the momentary appearance and disappearance of the red light, arising from the fluctuations of the jib, would have occurred at or near the time when the red light first disappeared; whereas, they did not occur then, but some considerable time afterwards. They should have been seen also from the Mayflower, which was not the case; the change there seen was from red to green, clear and solid and continuous, until the John Jay ported.

It is much more likely that the reappearance of the red light arose from unsteady navigation, of which the place of collision affords strong evidence, as above shown. This is rendered the more probable from other circumstances in the case. The captain of the John Jay was not steering for any single or definite point. There was no such custom-house barge-light at the battery as he testified to, but only the cluster of low lights, extending a quarter of a mile upon the water front. There are several higher lights further up the city; but it does not appear that he had any one of these in view. As the low lights of the battery were approached within three miles they would stretch over a considerable expanse. All that the captain aimed at

was, as he says, to keep these lights between the starboard forerigging and the foremast. His vessel was light, small, only 45 feet long over all, sailing in a stiff breeze, three points free, veered easily, and required constant minding of the helm; and the distance from the helm to the foremast was not great. That the captain was not very attentive is manifest from his not observing the lights of the Mayflower or Vesper, which had been in view for some time; and a similar inattention to his bearings would easily allow the schooner to luff, as she would naturally do, sufficiently to bring her red light momentarily into view; and without such luffing or a change of course he would not have reached the place of collision.

But had the red light been continuously hidden by the jib, as claimed, that would not improve the libellant's case. The Vesper can only be charged for some fault of her own. Her duty to keep out of the way of the schooner was conditioned upon her having notice of the situation and course of the John Jay by proper, visible lights. The rules of navigation require that these lights shall be "so constructed as to show a uniform and unbroken light over an arc of the horizon of 10 points of the compass, and so fixed as to throw the light from right ahead to two points abaft the beam," on either side. Rules 3 and 8, Rev. St. § 4233. If either light is so obscured that a steamer is mislead and deceived as to the course of the sailing-vessel, and a collision ensues in consequence, it is manifestly no fault of the steamer; and if the sailing-vessel suffer damage, it must be set down to her own fault or misfortune, as the case may be.

In the case of *Hoben v. The Westover*, 2 FED. REP. 91, to which I have been referred, the sailing-vessel was pitching and plunging in a tempestuous sea, producing fluctuations of her lights; and it was held the duty of the steamer observing this to have stopped in time to ascertain her course and avoid her. The point here is not merely the momentary changes of lights in a rough sea, but the continuous obscuration of one of them in comparatively smooth water, so as to mislead the steamer; and to this the case of *The Westover* has no application. In this case the captain of the Vesper, on seeing these fluctuations, which were but about a minute before the collision, blew two whistles, and almost immediately—in a few seconds, at least—rang four bells, to stop and reverse, and put his helm more to starboard to keep off still further. This was all he could do, so that even if the facts justified the theory of the libellant's counsel in regard to the obscuration of the red light by the jib, I should be obliged to hold the Vesper not in fault.

As the lights of the Vesper and Mayflower were certainly visible long before the collision, but were not seen, and as they must have been seen had the cook and deck hand been on the lookout, as they allege, it follows that little dependence can be placed upon any of their testimony; and reliance on the captain's testimony is also much weakened, not only by the errors and carelessness above shown, but by his positive testimony that he was steering for the custom-house barge-light at the battery, a light which has not been in existence for several years, while there was no single or definite light to supply its place.

As all the witnesses on the John Jay say that they saw no side lights of the Vesper, little weight can be given to their testimony as to the course and direction in which they supposed the Vesper was coming.

The want of any previous watch, and the captain's want of knowledge that he was approaching any steamer, put him probably in great confusion, and alarm upon his sudden discovery of a steamer in close proximity, and prevented any cool or correct observation of her course, or any proper judgment of the need of change of course, by himself. Those on the Vesper had been long in constant watch of the John Jay; their navigation was correct, if their testimony is to be believed; their account of the collision is consistent and credible, and as it is confirmed by the captain of the Mayflower, who had full opportunities of observing, and who is in no way interested, I see no reason to discredit it, and I must, therefore, hold that the collision was without fault on the part of the Vesper, but was brought about primarily by the want of a proper lookout on the John Jay, and the want of steady and observant navigation, which led, upon the sudden and unexpected discovery of the Vesper, to a hurried and injudicious change of course, in consequence of which, solely, the collision occurred.

The libel should therefore be dismissed, with costs.

It would not be proper to confine the word "trial," as used in the third section of the act of 1875, to trials as understood at common law, because it applies to "any suit of a civil nature at law or in

## THE BELGENLAND.\*

(Circuit Court, E. D. Pennsylvania. October 22, 1881.)

## 1. ADMIRALTY—JURISDICTION—COLLISION BETWEEN FOREIGN VESSELS.

The admiralty courts of the United States have jurisdiction of collisions occurring on the high seas between foreign vessels.

## Motion for Reargument.

This case had been decided upon appeal from the district court, the opinion being reported in 9 FED. REP. 126. Subsequently the following order was made:

"And now, October 19, 1881, Morton P. Henry and Henry R. Edmunds, proctors for the steam-ship *Belgenland*, pray for a reargument of this cause on the pleas filed therein; *i. e.*, as to the jurisdiction of the admiralty courts of the United States in this cause, growing out of a collision between foreign vessels, happening on the high seas, and not within the waters of the United States. It is therefore ordered that the said cause be set down for reargument on the said plea; the decree heretofore entered to be reopened until the question of jurisdiction is decided."

*Henry Flanders and J. Langdon Ward*, for libellant.

*Morton P. Henry and Henry R. Edmunds*, for respondent.

After argument the following opinion and decree were filed:

McKENNAN, C. J. And now, October 22d, the above cause came on to be heard on the pleas to the jurisdiction, and was argued by counsel.

And thereupon the following facts were found:

That the collision in question occurred between the *Luna*, a Norwegian bark, and the steam-ship *Belgenland*, which steam-ship was owned by the *Societe Anonyme de Navigation Belge-Americaine*, a Belgian corporation or association created by the laws of the kingdom of Belgium, and that the said steam-ship was a Belgian vessel in point of nationality, sailing under the Belgian flag; and that the collision occurred on the high seas, and not within the waters of the United States.

## CONCLUSIONS OF LAW.

That the admiralty courts of the United States have jurisdiction of collisions occurring on the high seas between vessels owned by foreigners and of different nationalities; and that the plea to the jurisdiction is overruled.

And ordered that the within finding be added to the finding heretofore filed, and that the decree made in the case stand.

\*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

## COIT v. NORTH CAROLINA GOLD AMALGAMATING Co.\*

*(Circuit Court, E. D. Pennsylvania. July, 1881.)*

## 1. EQUITY—PRACTICE—INSPECTION OF BOOKS AND DOCUMENTS.

The proper practice in equity, where, during the progress of the cause, either party desires information and use of the contents of books and documents in the possession of the other, is for the party desiring such information to file an affidavit, designating the books and documents, and averring the materiality of their contents, whereupon the court will allow the other party to file a counter affidavit, if he desires.

## In Equity.

Motion for rule on defendant to show cause why he should not produce certain books and papers alleged to be in his possession. Complainant filed no affidavit in support of his motion.

*E. F. Hoffman and C. Hart*, for motion.

*R. C. McMurtrie*, contra.

BUTLER, D. J., (*orally*.) The practice in equity formerly was to obtain information and use of the contents of books and documents in a party's possession, by bill of discovery, requiring the respondent to set out the contents at large in the answer; as this was found to be laborious, expensive, and tending to encumber the records unnecessarily, it was so changed as to require simply an acknowledgment of the existence and possession of the document, and upon such acknowledgment to obtain their production by motion. Where such information and use were needed in trials at law, the practice was the same, until the more convenient one, provided by statute, was adopted,—wherein an affidavit designating the books or documents, and averring the materiality of their contents, is substituted for the bill, and the absence of a counter affidavit is treated as acquiescence in what is stated. All the purposes of a formal bill are thus effected without any of the cost, labor, and delay of the former practice. There is no good reason why this more convenient and expeditious method should not be applied in equity to cases such as that now before the court. If the plaintiff had foreseen the need of the books and papers required, had designated them in his bill, and obtained an acknowledgment of their existence and possession, in the answer, he would have required nothing more to support his motion for their production. As, however, he did not do so, and the existence of the books and papers, and the defendant's possession of them, must be established,

\*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

this may be done in the manner just stated. There certainly ought not to be any greater degree of difficulty, or circumlocution, in obtaining an exhibition of such relevant and material matter in suits in equity than at law. In each equal care is required, and should be observed by the court, to avoid unnecessary exposure of a party's private affairs, or improper prying into his case,—by limiting the order for production and examination, to what is shown to be important to the mover's case. The practice here has not been uniform; and motions such as that in hand have, I understand, been allowed, without even the support of an affidavit. It was always, however, I believe, with the acquiescence, and virtual assent of the other side. The practice now indicated is deemed safe and proper and will hereafter be pursued.

The plaintiff has leave to file the required affidavit in support of his motion, and the case will then stand over for one week to allow the defendant to put in a counter affidavit if he sees fit to do so.

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NEW YORK & BALTIMORE COFFEE POLISHING CO. v. NEW YORK COFFEE  
POLISHING CO., (Limited.)

(Circuit Court, E. D. New York. December 27, 1881.)

1. EQUITY JURISDICTION—BILL TO PERPETUATE TESTIMONY.

A bill for the taking of testimony *in perpetuum rei memoriam* will not be entertained, if the matter in controversy can be made the subject of immediate judicial investigation by the party who files the bill.

2. REV. ST. §§ 866, 867.

The effect of the provision of section 867 of the Revised Statutes is not to exclude testimony taken under section 866, but to permit the courts of the United States to admit in evidence testimony perpetuated according to state law.

3. INVALID LETTERS PATENT—SUITS TO ANNUL.

Proceedings to annul letters patent are wholly within the control of United States attorneys. There is no absolute duty imposed upon them to commence such proceedings at the request of any party who declares a patent to be invalid.

In Equity. Demurrer to bill.

*Richards & Heald*, for plaintiff.

*Goodrich, Deady & Platt*, for defendant.

BENEDICT, D. J. This case comes before the court upon a demurrer to the bill. The bill is filed to obtain, at the hands of this court, a direction that the testimony of a witness, named William Newell, may be taken *in perpetuum rei memoriam*. The provision of statute



under which the bill is filed is found in section 866, Rev. St., where it is provided that "any circuit court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken *in perpetuum rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States."

The allegations of the bill, which are material on the present occasion, are these:

That the complainant has been and still is using, in the city of New York, a certain process, to the use of which the defendant claims the exclusive right under letters patent of the United States; that such letters patent are void for want of novelty; that in case suit shall be brought by the defendant against the plaintiff for infringement of the said patent the plaintiff relies, for its defence, upon the testimony of William Newell; that said Newell had himself made public use in the United States of the said process for upwards of 12 years before the said patent was issued; that said Newell is upwards of 90 years of age; that the defendant has neglected, and still neglects, to bring a suit against the plaintiff for its infringement of said patent, and the plaintiff is unable to bring its rights to a judicial determination.

In support of the demurrer to this bill it is first contended that the proceeding is vain because the deposition, if taken, will never be admissible in evidence in the suit which the complainants fear. This position is supposed to be sustained by the provision in the Revised Statutes, § 867, where it is provided that "any court of the United States may, in its discretion, admit in evidence, in any cause before it, any deposition taken *in perpetuum rei memoriam*, which would be admissible in a court of the state wherein such cause is pending according to the laws thereof." But the effect of the provision last quoted is misunderstood by the defendant. The provision is intended to permit the courts of the United States to admit in evidence testimony perpetuated according to the laws of the state, and in nowise relates to testimony perpetuated by direction of a circuit court of the United States in pursuance of the statute of the United States under which this bill is filed. Testimony so perpetuated is admissible in evidence in accordance with the usages and practice of courts of the United States, and by virtue of section 866, but not by virtue of section 867. The object of the bill is, therefore, legitimate, and the proceeding not vain.

The next ground taken in support of the demurrer is that the bill does not show a necessity for perpetuating the testimony of the witness in order to preserve the plaintiff's rights, inasmuch as, upon the facts stated in the bill, it would be the duty of the attorney general, upon the application of the plaintiff, to institute a proceeding in the

name of the United States to annul the defendant's patent, in which proceeding the testimony of the witness, Newell, could be taken with like benefit to the plaintiff as if taken by direction of this court in this proceeding, or in a suit brought by the defendant against the plaintiff.

It may be admitted that in cases of this description the rule is not to sustain the bill if it be possible that the matter in question can, by the party who files the bill, be made the subject of immediate judicial investigation, (*Angell v. Angell*, 1 Sim. & S. 89;) but no opportunity to have such a judicial determination appears open to the plaintiff in this case.

Clearly the proceeding by the attorney general, supposed by the defendant to be possible, is not such an opportunity to bring the matter to a judicial determination as the rule requires. If it be assumed that the attorney general has power to institute a proceeding in the name of the United States to annul the defendant's patent for want of novelty,—as to which see *Attorney General v. Rumford Chemical Works*, 9 O. G. 1062,—still it rests with the attorney general or the United States attorney, and not with the plaintiff, to say whether such a proceeding shall be instituted, and if so where and when instituted; whether the testimony of the witness, Newell, shall form part of the testimony in such proceeding. The plaintiff is without power to compel the institution of such a proceeding, and it cannot be known that such a proceeding will ever be instituted.

It is said the presumption is that a public officer will do his duty, but such presumption does not warrant the conclusion that the attorney general or the United States attorney will, as of course, institute a proceeding to annul the defendant's patent upon the plaintiff's application and assertion that the patent is void for want of novelty. There is no absolute duty imposed upon the attorney general, or any United States attorney, either by the common law or by any statute, to institute a proceeding to annul a patent issued for an invention, when applied to by any party asserting its invalidity for want of novelty.

Besides, the right which the plaintiff asserts in this bill is the right to have the validity of the defendant's patent adjudicated upon a consideration of the testimony of the witness, Newell, in regard to the fact asserted by the bill to be within the knowledge of that witness; and if the plaintiff's application to the attorney general for a proceeding to annul the defendant's patent would create a duty on the part of the attorney general to institute such a proceeding, no duty

to call Newell as a witness would arise. Such a proceeding would be wholly within the control of the attorney general, (*Mowry v. Whitney*, 14 Wall. 441,) and the most that can be said is that it is possible that the plaintiff's right to the testimony of the witness could be preserved by a proceeding taken in the name of the United States, assuming, but not deciding, that the power to institute such a proceeding exists. Such a possibility affords no reason for refusing to entertain the bill under consideration.

There must be judgment for the plaintiff upon the demurrer, with leave to answer on payment of costs.

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SIMMONS v. SPENCER and others.

(Circuit Court, D. Colorado. 1881.)

1. PLEADING—JOINT ACTION ON CONTRACT.

In an action against two or more as for money had and received, a complaint is demurrable which shows that the money was received otherwise than jointly.

2. CASE STATED.

Certain deeds were left with a bank to be delivered on the payment of a specified sum of money, which it was instructed to place to the plaintiff's credit. The money was paid in and turned over to a third party. No credit therefor was given. *Held*, that a joint action as for money had and received could not be maintained against the bank and the third party

Ruling on Demurrer.

*S. P. Rose*, for plaintiff.

*H. B. Johnson*, for defendants.

HALLETT, D. J., (*orally*.) The first and second counts of the complaint set forth, in substance, a sale of certain property, which the plaintiff alleges belonged to him, and conveyances from the plaintiff to McCartney, and from McCartney to the defendant Spencer, which conveyances were deposited with the Merchants' & Mechanics' Bank of Leadville, to be delivered upon payment of a sum of money, amounting to \$20,000, for the use of the plaintiff. By instructions given upon the leaving of the deeds with the bank, the money was to be deposited to the credit of the plaintiff in this suit. Plaintiff received \$7,000 of this sum, and \$13,000, which was afterwards paid by the purchaser, whoever he may be, was not by the bank placed to the credit of the plaintiff, but was, in fact, turned over to the defendant Spencer. And upon this state of facts it is claimed that a liability has arisen upon the part of all the defendants to pay the plaintiff this sum of \$13,000. The structure of these two counts

is for money due upon a contract; for money had and received by the defendants to the plaintiff's use. Nothing is said about any conversion of the money by the defendants to their own use, and there is nothing in the counts to indicate that they are based upon the theory that a tort was committed by the defendants in receiving this money and appropriating it in the way in which it is alleged they disposed of it.

In order to maintain an action as for money had and received it must appear that the money was *jointly* received by all the defendants, and upon that the law may imply a promise on the part of all to pay it to the rightful owner; and although, upon the facts stated here, there may be a liability in that form of action against Spencer alone, or against the parties constituting the Merchants' & Mechanics' Bank of Leadville alone, there cannot be a joint liability on the part of all these persons in that form of action, because they did not jointly receive this sum of money. The allegation is, in these counts, that the money was received by the Merchants' & Mechanics' Bank of Leadville, and by it wrongfully and fraudulently turned over to the defendant Spencer. That may make a liability as for money had and received on the part of these parties, severally,—that is, upon the part of the persons constituting the bank and upon the part of Spencer, severally; but it cannot be a liability arising by contract on the part of all of them, because they did not jointly and collectively receive this money.

As to whether the action may be maintained against them jointly as for a tort,—in substance, as an action of trover,—there is some doubt. It is laid down in the case of *Orton v. Butler*, 5 B. & A. 652, that on a money demand merely to allege that the defendant received money and afterwards converted it to his own use, which is the form of declaration in an action of trover, the action cannot be maintained, because, they say, to allow that would be to defeat the defendant's right to set-off; and that the action of trover can only be maintained where the specific thing for which suit is brought can be identified, and that it must be possible in such case, where an action of trover is brought, for the defendant to relieve himself from all liability by tendering the property, for which the action is brought, to the plaintiff; as, for instance, when it is brought for a horse, he may surrender the horse and relieve himself from liability.

The same view is taken in several cases in Croke's Elizabeth; and there are cases—one in 4 E. D. Smith, N. Y., (*Donohue v. Henry*, 162,) —which declare that when a sum of money has been received which

belongs to the plaintiff in the suit, and concerning which it is the duty of the defendant to turn over the very sum which he received to the plaintiff, *the very money, the same dollars and the same bills*, if he received it in that form, that then, if he makes any other disposition of it, the action of trover may be maintained. *Petit v. Bonju*, 1 Mo. 64, is a case in which the plaintiff brought an action in that form against parties who were conducting a lottery, claiming that he had become entitled to a sum of money as the holder of a ticket in the lottery, and that they had wrongfully refused to pay it over to him, and seeking in trover to recover the amount. The court say, in that instance, that if, in fact, any sum of money had been set apart to the plaintiff,—\$100, I think, was the amount,—if it had been parcelled off by itself, by the defendants, as his money, and afterwards they had taken those dollars and converted them to their own use, he might bring an action of trover for the dollars so parcelled off; but that he could not, upon the general charge that so much money was due to him, and wrongfully detained by the defendants, maintain that action. His action must, in that case, be in the form of an action on contract, if he would recover at all.

That is the distinction that, I think, is recognized in all of the cases, and, applying it to the present case, it may be true that the defendants, the Bank of Leadville, as to the very bills, notes, or coin, if it was such, which they received for this property, may be liable in an action of trover, or an action founded in tort for the conversion of that money, if it be so alleged in the complaint. And if that money—the very same money—was paid over to Spencer, he also would be liable, and then and in that case they both might be joined in one action as tort-feasors. To illustrate, I will read a paragraph from Bliss on Code Pleadings:

“Under the Code, an action for the recovery of personal property will lie against one who has wrongfully parted with the possession of property, jointly with one in actual possession.” Section 83.

And the same principle applies to trover:

“Thus, one who has wrongfully pledged plate belonging to the plaintiff is liable to an action of detinue, jointly with the person to whom it had been pledged. So, where one has fraudulently obtained a credit upon a bill of goods, and assigned them over for the benefit of his creditors, the vendor, having the right to repudiate the sale and pursue the goods, may make both the purchaser and his assignee parties to an action for their possession.” *Id.*

For this the case of *Nichols v. Michael*, 23 N. Y. 264, is cited. The principle declared is that where a party has the right to a specific

thing, and he can pursue that particular thing through several hands, he may charge all of these parties consecutively, or all who held the property consecutively, in one action, for its value. So that here, if it be true that the Smiths, or the persons who constitute the Merchants' & Mechanics' Bank, received this money, and turned over the same money to Spencer, they may be jointly charged, in proper phraseology, as for converting that money, but not otherwise. And it must be the identical money.

These cases, and all the authorities that I have been able to find, go to the point that where an action is founded in tort, and maintained upon that principle, it must be for the conversion of the specific thing, and it can only be maintained where the property itself can be traced to the hands of the party to be charged. In that aspect, if the facts are truly stated in the first and second of these counts, no joint action can be maintained against these parties, unless the pleader may be able to allege that the same money came to the defendants the Merchants' & Mechanics' Bank of Leadville, and the defendant Spencer, successively. The plaintiff must allege that it was the same money, and that the defendants converted it to their own use, in order to make it an action for tort.

Upon the other theory, there is no difficulty in maintaining an action against either of the defendants separately as for money had and received, and, upon that principle, the third count, which states nothing as to the way in which the money came to the hands of the parties, but merely charges that the defendants are liable to the plaintiff for \$13,000, received by them for the use of the plaintiff, is not open to any objection.

The ruling upon the demurrer, therefore, must be, that it is sustained as to the first and second counts, because there the facts are stated which show that the defendants cannot be jointly liable, and overruled as to the third count, because nothing appears in that count to indicate that they may not be jointly liable.

If I have made myself understood, it will be apparent that the plaintiff must amend so as to make this substantially an action of trover for this sum of money against all these parties, or by dismissing his action against one or the other of the defendants. If the action were dismissed as to Spencer, or as to the defendants who constitute the Merchants' & Mechanics' Bank of Leadville, I would see no difficulty in maintaining it against the other.

## HALL v. MEMPHIS &amp; CHARLESTON R. Co.

(Circuit Court, W. D. Tennessee. December 24, 1881.)

## 1. CARRIERS OF PASSENGERS—LIMITED TICKETS—EJECTION FOR NON-PAYMENT OF FARE—CONTRIBUTORY NEGLIGENCE.

Although a passenger may have the right to be carried under a special contract, if he be not provided with a ticket the conductor can recognize, he must pay the fare demanded by the conductor, under a reasonable regulation requiring him to demand a fare of persons without tickets, and cannot insist on being expelled by force as a foundation for a suit for damages for wrongful expulsion. By this conduct he contributes to his injuries, which are the direct result of his own conduct, and not of the breach of any special contract he may have for his carriage.

Mr. and Mrs. Hall are a gentleman and a lady aged 85 and 76, living at Town Creek, Alabama. Last April they desired to go to Texas, and purchased three round-trip tickets to Memphis for themselves and daughter. According to his proof he was not aware of a limitation printed on the tickets, "Not good after 30 days," and carried them back to the station agent to get unlimited tickets, and the agent told him they were good after the 30 days, and he would not be put off the train if he kept them. On his return home the conductor refused to take the tickets, and demanded train fare. The old gentleman offered to pay the difference between the price of the tickets and train fare, and told the conductor that if he did not accept that proposition he would have to put them off by force, which the conductor did, putting them off at White's station, where they spent the night at the station-house under circumstances of great discomfort and some injury to the old gentleman and lady. The conductor tried to persuade him to pay the fare at least to Collier-ville, and told him he disliked to put him off under the circumstances, but would have to do it. The agent denied that he had told the plaintiff that he could ride on the tickets after they had expired. There was a great conflict of testimony in the case, on most of the points, as to whether the plaintiff had been misled about the tickets.

*Wright & Folkes*, for plaintiff.

*Humes & Poston*, for defendant.

HAMMOND, D. J., (*charging jury*.) It being an undisputed fact in this case that the plaintiff was provided with the money to pay the fare demanded by the conductor, it was his duty to have paid it if he desired to continue his journey in that train, whatever may have been his rights under the special contract he seeks to prove in this case; and the regulation of the company requiring the conductor to eject a passenger who refuses to pay the conductor's rates was not unreasonable. Whatever injury the plaintiff received was the direct result of his refusal to comply with this reasonable regulation, was not the result of the breach of any contract made for his carriage, and he cannot complain of injuries so received unless you

find that unnecessary force was used in expelling him; and then, on the undisputed facts of the case, the resistance he offered to the conductor would contribute to those injuries to that extent, that, in this case, he would be entitled to recover nothing on that score. And now, on the undertaking of the defendant's counsel that a verdict may be entered up for the money paid by the plaintiff for the extra tickets, if the court shall conclude, on the motion for a new trial, or on further consideration without such motion, that the plaintiff in this action is entitled to it, you are instructed to find for the defendant company.

The court added that it was his opinion, and it was proper to express it, that, in consideration of the extreme age of this lady and gentleman, the conductor should have exercised a discretion he clearly had to not enforce the rule, by taking them at least to Collierville, where they could have had better accommodations than at the place he put them out; but this was, strictly, only a privilege or courtesy to be shown to old age, and not a legal right.

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UNITED STATES *v.* LEVERICH and others.

(*District Court, S. D. New York. December 12, 1881.*)

1. LEGACY TAX—ACT OF 1864—TRUST DEED.

The act of 1864, (13 St. at Large, 285, § 124,) imposing a legacy tax on certain personal property, embraces cases only where the person to whom the beneficiaries are related died possessed of the property.

Where S. D., in 1864, before the passage of the act, executed to trustees a valid deed of a large amount of personal property in trust to collect the interest and pay it to himself and his wife until the death of the survivor, and, thereafter, to pay over and distribute the principal to his children, and the grantor thereafter died in 1866, and his wife in 1868, and thereupon the whole property was immediately distributed among the children, and the grantor having by the state law "no estate in law or in equity" in the property so transferred, and not being possessed thereof at the time of his death, *held*, that no tax accrued to the government, under section 124, upon the shares distributed by the trustees to the children.

*S. L. Woodford*, U. S. Atty., and *E. B. Hill*, Asst. Dist. Atty., for plaintiff.

*Miller & Peckham*, for defendants.

BROWN, D. J. This is an action to recover a tax on distributive shares of personal property under section 124 of the act of June 16, 1864, (13 St. at Large, 285.)



On June 7, 1864, Stephen Duncan executed to Charles D. Leverich and Henry S. Leverich a deed of personal property, consisting of stocks, bonds, railroad shares, etc., to the amount of about \$227,500, in trust, to take possession of the same, to collect the interest thereon, and to pay the income thereof to himself and to his wife, in manner stated in the trust deed, until the death of the survivor of them, and thereafter to distribute the principal and any accumulated interest to his children. Charles D. Leverich, prior to and at the time of the execution of the deed of trust, had in his individual custody and possession all the property so conveyed. Both trustees signed the trust deed accepting the trust, but Henry S. Leverich never had the custody of any of the property, never received any of the proceeds of it, and never took any part in the execution of any of the duties imposed by the trust deed. The whole business of the trust was managed by Charles D. Leverich alone, who retained possession of the property, collected the income, and paid it over as directed by the deed—in part to Stephen Duncan, until his death, in 1866, and in part to his wife, who died in 1868. Upon her death he distributed the whole property to and among the children of the grantor according to the terms of the trust. Charles D. Leverich died in 1876, and no tax was ever paid or claimed up to the time of his death. This suit to recover \$3,805, the taxes alleged to be due upon the distribution of the shares to the children in 1868, was brought on September 13, 1879, against Henry S. Leverich, the surviving trustee, and the other defendants, who are the executors of the deceased trustee.

I am of opinion that no tax accrued to the government upon the shares distributed under this trust deed, under section 124, as claimed. This case does not come under the first clause of the general words of that section, for the reason that the property here did not "pass after the passage of this act from any person possessed of such property, either by will or by the intestate laws of any state or territory." To come under the second clause of the general words of section 124 the case must be one of "a person having in charge or trust \* \* \* any personal property \* \* \* transferred by deed, etc., made or intended to take effect in possession or enjoyment after the death of the grantor, to any person or persons;" and it must also come under some one of the five following subdivisions of that section. But the only persons described in any of those five subdivisions are persons who, being entitled to the beneficial interest in such property, also stand in a certain relationship "*to the person who died possessed of such property.*"

Now, the facts here show that the grantor did not "die possessed" of said property. He had parted with the title to the property and the possession of it, by deed executed and delivered several years before his death, and before the passage of the act. The deed created a valid trust of personal property under the laws of this state, (1 Rev. St. p. 773, part 2, c. 4, tit. 4, §§ 1, 2; chapter 1, §§ 55, 60, p.

729,) and in such cases "the whole estate is vested in the trustees in law and in equity, subject only to the execution of the trust. The person for whose benefit the trust is created takes no estate or interest in the property." 1 Rev. St. 729, § 60. No interest in this property which Mr. Duncan had at his death ever passed to his children. The whole legal title and the possession were in the trustees long before the grantor's death, and so continued for two years afterwards, without change, until the death of his wife, when the legal title to the property and the possession passed direct from the trustees to the children. What the children thus took was not anything which Stephen Duncan or any other person had "died possessed of," but what the trustees had had in their own possession along with the legal title long before. It appears, therefore, that the children did not take this property from any person "dying possessed of it," and therefore section 124 of the act of 1864 does not embrace this case. As to beneficial interests accruing, not "by will or intestate laws," but by deed "intended to take effect after the death of the grantor," the act can only apply to cases where, under such deeds, the ancestor or other relative of the beneficiaries mentioned in the five subdivisions of section 124 was entitled to hold possession till his death, and "died possessed" thereof. This is not such a case.

The language of section 125 confirms the same view. It provides that the tax or duty aforesaid shall be a lien or charge upon "the property of every person who may die as aforesaid," etc. The words "every person who may die *as aforesaid*" can only refer to the words which are repeated substantially in each of the five subdivisions of section 124, viz., "the person who died *possessed of such property*," and the lien is given upon the property of such person only; and there is none such in this case. The act, I think, plainly contemplates those cases only, whether arising under will, intestacy, or trust deeds, in which the grantor, the testator, or deceased relative had the legal possession or ownership of the property up to his death, and not cases like this, where, in consequence of a valid trust created before the passage of the act, the grantor or ancestor had, according to the law of his domicile, no legal or equitable estate in the property at the time of his death, and where the property was subsequently distributed among his children through the medium of a long prior trust. The complaint should, therefore, be dismissed.

## SEAY v. WILSON, Assignee.

(Circuit Court, W. D. Missouri. 1881.)

## 1. CREDITORS' LIENS ON PROPERTY OF THIRD PARTIES—RELEASE—APPLICATION OF CONSIDERATION.

Where a creditor of a bankrupt has a lien on the property of a third party, as part of the security for his debt, he cannot release his lien for a consideration without crediting the amount of the consideration on his claim.

On Appeal.

*L. F. Parker*, for appellant.

*B. B. Kingsbury*, for appellee.

MCCRARY, C. J. The controversy in this case relates chiefly to the amount which should be allowed appellant upon a judgment in his favor, and against the bankrupt and one Hawkins, rendered in the circuit court of Phelps county, Missouri.

That judgment was upon a note executed by the bankrupt as principal, and Hawkins as surety, and the judgment was against both. Hawkins died insolvent, leaving assets enough to pay a portion only of his indebtedness. The judgment above mentioned, in favor of appellant, Seay, was a lien upon certain real estate of Hawkins, deceased, as were also two other judgments,—one in favor of one Love and the other in favor of one Branson. The appellant also held another and a subsequent judgment against Hawkins, deceased. Certain real estate of the estate of Hawkins having been sold, and the proceeds being in the hands of the administrator for distribution, it was agreed between appellant, Love, and Branson, all being judgment creditors of Hawkins, and entitled to share *pro rata* in such distribution, that appellant should receive \$450 as his full share of said proceeds, and the remainder should be divided between Love and Branson. In pursuance of this agreement the said sum of \$450 was paid to appellant, and by him credited upon his junior judgment against the Hawkins estate, and not upon the prior judgment against the bankrupt and the Hawkins estate. The district court held that the application of this payment of \$450 to the satisfaction of the junior judgment was improper, and that the same was in equity a payment upon the judgment against the bankrupt and should be credited accordingly. This ruling is assigned as error.

It is said that the payment was not made by the bankrupt, nor by the assignee, nor by any one for them, or either of them. This must be admitted, but the admission does not dispose of the question. It is equally true that the payment was not made by the administrator of Hawkins, nor out of the assets of his estate. If, under the peculiar circumstances of this case, we were to adhere to the rule that the money paid must be applied on the debt of the party making the payment, we should meet the same difficulty, whether we sought to apply it on the judgment against the bankrupt, or on that against the

Hawkins estate. We must, therefore, look for some other rule for our guidance. The money was paid by Branson and Love, who were not liable upon either judgment. The payment was, therefore, not made by them because of any personal liability on the part of either of them. Why, then, did they pay it? Evidently, for the reason that the judgment of appellant against the bankrupt was a lien upon the proceeds of the sale of the Hawkins land on a par with their own judgments, and the appellant was, therefore, entitled to share with them in those proceeds. While, therefore, the payment was not made in a strict and technical sense upon the judgment against the bankrupt, it was clearly made because of that judgment, and on account of the fact that it was a lien. Of course, if appellant had held no judgment against Hawkins except the one which was junior to those of Branson and Love, they would have paid nothing. It was the existence and priority of the judgment against the bankrupt and the Hawkins estate that made the payment necessary. The appellant used that judgment to enforce payment, and, having done so, undertook to apply the payment, when made, upon another and junior judgment, which could not have been used to secure or enforce the payment.

This is not a case for the application of the rule that, where a debtor pays a sum of money to his creditor, the two may agree that it shall be applied to either of several debts. The relation of debtor and creditor did not exist between appellant and Branson and Love. These three parties, Seay, Branson, and Love, each held a judgment which was entitled to share in the fund raised by the sale of the Hawkins estate. The two latter paid the former \$450, to release his claim under his judgment against said fund. This amounted to an enforcement of his judgment lien against said fund to that extent. The appellant cannot, as against the other creditors of the bankrupt, be placed in a better position than he would have occupied if he had made no bargain with Branson and Love, and had insisted upon and received the share in the fund to which his judgment entitled him; and if he had done that, no one will question that it would have been his duty to credit what he received on the claim which was enforced, to-wit, the judgment against the bankrupt. By a sort of indirect or circuitous arrangement with the other lienholders, he has, in effect, enforced his judgment lien to the extent of \$450. The assignee of the bankrupt, acting for the creditors, has a right to insist that the credit shall be entered, just as if the enforcement of the lien had been direct instead of indirect. The rule, then, by which we are to be

guided, may be stated as follows: Where a creditor of a bankrupt has a lien upon the property of a third party, as part of his security for his debt against the bankrupt, he cannot release that lien for a consideration without crediting such consideration on the claim against the bankrupt estate. If he could do so, he might thereby secure more than his due, by releasing his lien against the third party for a price paid, and afterwards enforcing his entire claim against the bankrupt estate. The fact that the appellant had a second unsecured claim against the Hawkins estate, does not alter the case. It was the prior lien that was indirectly enforced, and the release of the junior judgment was not thought of, and of course no such release could form a part of the consideration for the payment of the money. It follows that the application of the payment to the satisfaction of the junior judgment was void.

It is insisted that the assignee is estopped to claim credit for the payment in question, because subsequently thereto the judgment was revived in a proceeding in *scire facias* in the state circuit court in a cause to which the assignee was a party. The fact of the payment was unknown to the assignee at the time the *scire facias* proceeding was pending, and, of course, it was not litigated. The main purpose of proceedings in *scire facias* under the statute of Missouri is to revive the judgment, and thereby to preserve the lien thereof upon real estate. Rev. St. Mo. §§ 2732-2738.

Whatever the effect of a judgment of revival in such a proceeding may be in ordinary cases upon the parties to the original judgment, I am clearly of the opinion that an assignee in bankruptcy is not thereby estopped to insist that the judgment revived had been in part satisfied, especially in a case like the present, where he had no knowledge or notice of such part satisfaction at the time the judgment was revived. Neither the judgment debtor (the bankrupt) nor his assignee had anything to do with the payment; and it is difficult to see upon what principle it can be held that the latter was bound to ascertain the fact and set it up in that case. To require this would be to impose upon him not merely the duty of exercising due diligence, but much more.

The appellant alone, of all the parties to that suit, knew of the payment, and it was his interest to keep it secret, or at least to make it appear to be a payment upon the subsequent judgment. It would have been next to impossible for the assignee to discover the fact, there being nothing to put him upon inquiry. It may be conceded that where, in a proceeding in a state court to revive a judgment

against a bankrupt, the question of a payment is raised and litigated between the plaintiff in such judgment and the assignee in bankruptcy, the federal court of bankruptcy is bound by the judgment; though this may be doubtful. No such case is presented here.

The question of payment was not raised, and was, of course, not decided; and, for reasons already stated, I hold that it was not the duty of the assignee to raise it in that case. I find no error in the judgment of the district court, and the same is accordingly affirmed.

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*In re SMITH, Bankrupt.*

(*District Court, D. New Jersey. December 22, 1881.*)

1. DISCHARGE.

A bankrupt's application for a discharge is seasonable if made before the discharge of the assignee.

2. SAME—TRANSFERS.

A year before his failure the bankrupt made a transfer of some of his property without consideration. *Held*, on the evidence, that it was not made in contemplation of bankruptcy

*In Bankruptcy.*

*Coult & Howell*, for bankrupt.

*Henry Huston*, for creditor.

NIXON, D. J. Thirteen specifications are filed against the bankrupt's discharge. On the argument only the third, sixth, seventh, eighth, eleventh, twelfth, and thirteenth were relied upon by the opposing creditor. The third alleges that the bankrupt did not apply for his discharge within a reasonable time. Before the act of July 26, 1876, the law required that the bankrupt, having no assets, should apply for his discharge within one year after the petition in bankruptcy was filed. That act extended the time "to the final disposition of the cause," which has been held to mean the final disposition of the administration of the estate, including the discharge of the assignee. There is no proof before me that the assignee has been discharged. The sixth and seventh allege that the bankrupt allowed fictitious claims to be proved against his estate, severally specifying the proofs of debt made by Abraham Smith, his father, and Jacob Guild, his brother-in-law. The testimony put in by the opposing creditor shows that both of these persons had valid and subsisting claims against the bankrupt. The eighth was that the bankrupt did not keep proper books of account. It was in evidence that he failed in business in the year 1874; that he had books of account while the

business was carried on; that after his failure they were taken by him to his father's house, at Deckertown; that all collectible debts were collected; that he left them there during the year 1876, while he was living in Chicago, and that, without his knowledge or wish, they were sold by his sister to the rag-man, as waste paper, under the impression that they were of no value to any one. All the proof is to the effect that they were regularly kept, and were valueless to the creditors. The remaining specifications have reference to the transfer and assignment by the bankrupt of mineral leases to his brother-in-law, Guild, and of an endowment policy of life insurance for \$5,000 upon his life to his father, Abraham Smith. The allegation is that these were transferred by him in contemplation of bankruptcy. I have had no difficulty in regard to the leases, as the evidence is quite clear that they were of no value, either in the hands of the bankrupt or of his assignee. But this is not the case as to the insurance policy. It was taken by the bankrupt on his own life, in the Mutual Life Insurance Company of New York, in 1866, on the plan of its becoming a paid-up policy at the end of 10 years, and all the annual premiums, except one or two, had been paid by the bankrupt at the time of the assignment, and the unpaid premiums were afterwards settled by a transfer of accumulated dividends. It was assigned without the payment of any consideration. The bankrupt says that he gave it to his father because he wanted his parents to have the benefit of it in case of his death. The father testifies that he knew nothing of the transfer for a year or two after it had been assigned to him. Whatever the intention of the bankrupt may have been, the effect of his action was to give over to his father, as against the claims of creditors, a valuable asset. Where the company is solvent, a paid-up policy will generally be purchased by the institution; and where this cannot be effected it has a market value. The counsel for the bankrupt insisted, on the argument, that it could not be said it was assigned "in contemplation of bankruptcy," because the assignor did not go into bankruptcy until five years afterwards. But that is not the meaning of the phrase as used in the law. It occurred in the bankruptcy act of 1841, and had received a judicial construction when the late act was passed.

In *Everett v. Stone*, 3 Story, 453, Mr. Justice Story said: "‘Contemplation of bankruptcy’ means a contemplation of becoming a broken-up and ruined man; according to the original signification of the term, a person whose table or counter of business is broken up,

*bancus ruptus.*" In order, therefore, to show that the debtor contemplated bankruptcy, it is not necessary to prove that, at the time of the transfer, there was in his mind an actual intention of becoming a bankrupt. If his pecuniary condition or act committed was such that he could not reasonably avoid becoming a bankrupt, the law considers him as acting in contemplation of bankruptcy. The question, then, is: What was the pecuniary condition of the bankrupt on the eighteenth of April, 1873, when the gift was made to his father? The burden of proof is on the opposing creditor. It is his duty to make it clear that the bankrupt was so much involved that he was in insolvent circumstances, and that bankruptcy was imminent. Has he done so? The bankrupt was two or three times under examination as a witness, and, speaking of the state of his affairs at the time of the assignment of the policy to his father, he says:

"At that time I considered I was good financially; I considered myself worth from six to ten thousand dollars after the payment of all my debts. At that time my property consisted of my store-house, stock in trade, books of account, notes, etc."

Although he gave other testimony on the subject, which excites suspicion and tends to a different conclusion, I am not willing to say that he has positively contradicted it. His failure the next year can be traced to other causes, for he began in the winter of 1873-4 to speculate in mineral lands and stocks, and his operations seemed to have been financially disastrous. In enumerating his debts during the month of April, 1873, he says that he was liable to the Domestic Sewing Machine Company, on account of the transactions of his brother, in \$7,000 or \$8,000. But he must have been relieved subsequently from the payment of the larger part of this sum, as he elsewhere states that his net loss on account of his brother was not more than from \$2,000 to \$4,000. In short, the proof does not satisfy me that he was insolvent when the transfer or gift was made, and hence I am relieved from considering whether a gift under such circumstances—so long a time before the bankruptcy proceedings began—is one of the grounds for withholding a discharge under the ninth clause of section 5110 of the bankrupt act.

A discharge will be granted.



## SIX HUNDRED TONS OF IRON ORE.

(District Court, D. New Jersey. December 10, 1881.)

## 1. FORFEITURES—LIENS FOR FREIGHT.

Where freight is earned before the government makes its election whether to declare the merchandise, of which a false and fraudulent entry has been made, forfeited, or to recover its value by suit against the parties making the entry, and the former proceeding is finally chosen and the property is sold, *held*, that such freight must be paid out of the proceeds of the sale, the owners of the vessel having no knowledge before it was earned of any offence, committed or premeditated.

## 2. SAME—DELIVERY.

Manual delivery of the cargo by the ship-owners to the consignees does not, of itself, operate necessarily to discharge their lien for freight. Where the intent of the ship-owners in making such delivery is to discharge the cargo, and not to deliver it, their lien for freight remains in full force.

*Jas. K. Hill and Wing & Shoudy*, for petitioners.

*A. Q. Keasbey*, U. S. Atty., for the Government.

NIXON, D. J. The petition is filed in this case by the owners of the steam-ship *Italia*, of the Anchor line, to recover from the proceeds of the sale of a quantity of iron ore, now in the registry of the court, the sum of \$1,305.61, as freight for the transportation of said ore in the *Italia* from the port of Almeira, in Spain, to the port of New York. The ore was shipped at Almeira by one Joseph Ribiera, about the ninth of March last, and was to be carried to New York and delivered to Messrs. Schenck & Co., for the freight of nine shillings British sterling per ton of 2,000 pounds weight, and the usual bills of lading were executed therefor. Before its arrival there Schenck & Co. entered into a written contract to sell the cargo to Joseph K. Wells. The ore was guarantied to be not less than 55.56 of iron and 3.42 of manganese, making a total metallic yield of 58.98. A deduction of 10 cents per unit per ton to be made for any less percentage, and 10 cents per unit per ton added for any excess; the analysis to be determined from sample to be drawn from the cargo as discharged, and to be analyzed as received. The price agreed upon was \$5.90 per ton, duty and all charges paid, and to be delivered to the purchaser from the ship at the harbor of New York, and to be paid for—one-half cash on delivery of custom-house permit, and the balance on presentation of United States weigher's certificate of weight, and certificate of sampling and analysis. On the date of the execution of the contract Wells paid \$200 on account, and in advance of the approximate one-half to be paid by him on the delivery of the custom-house permit; the said

Schenck & Co. agreeing, if the ore did not arrive, to pay back the said \$200. The steam-ship reached her pier in the port of New York on the twentieth of April, 1881. Schenck & Co. paid the duties and obtained the usual custom-house permit for the landing of the ore, which they delivered to Wells on the next day, (21st,) and received from him \$1,670 on account of payment on the whole shipment. Wells then procured and sent to the steam-ship three barges or canal-boats, with instructions to take the ore on board and proceed to the railroad dock of the Morris & Essex road, at Hoboken, New Jersey, and there remain until he gave further orders. The steam-ship company began to discharge the ore on the twenty-second and finished on the twenty-eighth of April, the three boats crossing the river at different times and mooring in the basin of the Morris canal. On the twenty-ninth the collector of New York, discovering a fraudulent undervaluation of the goods by Schenck & Co., the importers, caused the same to be seized while yet in the basin of the Morris canal at Hoboken; reported the seizure to the district attorney for this district, who filed the usual information in such cases for forfeiture, and duly condemned the cargo, no one appearing to contest the forfeiture. Pending these proceedings the marshal took possession of the ore, and, by order of the court, sold it for \$3,200, and paid the proceeds of the sale into the registry of the court, where they still remain. Are the owners of the steam-ship entitled to demand and receive from these proceeds the freight money still due and unpaid on the importation, or are they obliged, under the circumstances, to look to the consignees for payment?

The case presents two questions for consideration: (1) Was the lien of the ship-owners on the cargo for freight lost by the delivery made? (2) If not, does the forfeiture of goods, under sections 2839, 2864, Rev. St., extend to and include the interest of *bona fide* lienors without notice of the fraud?

It is conceded that by the maritime law the ship-owner had a lien upon the goods transported for the freight, unless there be some stipulations in the contract of affreightment inconsistent with the exercise of the lien; as, for instance, when the freight is made payable at a date subsequent to the delivery of the cargo. For, unlike the *privilegium* under the civil law, the lien for freight depends upon the possession, and is lost when an unconditional delivery is made, or when any agreement is entered into by the parties in regard to the payment of freight, which involves a prior surrender of the possession. In the present case, the ship-owners, undoubtedly, intended to have

and retain a lien on the merchandise for the freight; for, in addition to their right under the law-merchant, they inserted a clause in the bill of lading that "the captain or owner should have a lien on the goods for the payment of freight and all expenses;" and on the day after the arrival of the steamer in New York, they caused a notice to be served upon the superintendent of the dock, as appears to be their custom when the consignee is unknown, or they are not willing to trust to his personal responsibility, to hold the ore until the freight was paid. These facts are important, in so far as they rebut any presumption drawn from the acts of the parties of the waiver of the lien. *The Kimball*, 3 Wall. 44. With the above notice in their possession, the agents of the owners began to unload the ore into the canal-boats on the twenty-second of April, and continued until it was all discharged, on the 28th. One of the boats, in the mean time, being loaded, left the pier and crossed the river to the Morris canal basin. The remaining two, having received the residue of the cargo, followed her there. The superintendent says that he did not know of the departure of the first boat; but he acknowledges that he was informed of it before the others left, and offered no objections, and took no steps to have it brought back. His testimony in the matter is quite significant. Being asked, "Did you make any remonstrances to the men that were in the other two boats about the first one going away?" he answered: "No, sir; I thought everything was all right, because the same man had been taking ore from us previous to that, and I supposed there would be no trouble about it." Nor did he make any efforts to ascertain its destination, and did not know where it had gone until some days afterwards, when, at the request of the captain, he visited the boat in the Morris canal basin, to examine into some alleged damage which it had received from the steamer while loading the ore. *Libellant's Testimony*, pp. 27, 28. It is often a difficult question to determine what acts on the part of the ship-owner amount to a waiver of the lien for freight. It is not divested by a delivery to the consignee or his agents if conditions are annexed to the delivery, or if there be an understanding, express or implied, that the lien shall continue. *Bags of Linseed*, 1 Black, 108.

In *151 Tons of Coal*, 4 Blatchf. 468, Judge Nelson went still further and said that "the mere manual delivery of the coal by the carrier to the consignee did not, of itself, operate necessarily to discharge the lien. The delivery must be made with the intent of parting with his interest in it, or under circumstances from which the law will infer such an intent." Applying these principles to the

facts, it is a close question whether the lien has been waived or not. I confess to a serious doubt on the subject. But, remembering that a court of admiralty is the "chancery of the seas," and that the libellants have a strong equitable claim upon the forfeited goods for freight, in view of the fact that the transportation added considerably to their value here, I incline to the opinion that the intent of the owners was to discharge the cargo, and not to deliver it, and that the lien for the costs of transportation has not been waived. I am strengthened in this opinion by the additional facts that the bills of lading have never been surrendered, and no receipt given to the steam-ship for the ore, as is customary in such cases, after delivery.

2. The ore has been forfeited under sections 2839, 2864, of the Revised Statutes. Does such forfeiture carry with it the lienor's interest in the condemned merchandise? Some discussion took place between the respective counsel, at the hearing, in regard to the effect which the recent legislation of congress had upon this question. By the third section of the act of March 2, 1867, (section 2981, Rev. St.,) the collector, or other chief officer of the customs, is authorized, on being notified in writing, by the owner or consignee of any vessel, of a lien for freight on any merchandise imported in such vessel, to refuse the delivery of the same from any public or bonded warehouse, or other place, in which the same shall be deposited, until proof to his satisfaction shall be produced that the freight has been paid or secured. The provisions of this section were modified by a substitute passed June 10, 1880, (Supp. to Rev. St. vol. 1, p. 547,) in which the proper officer of the customs, on receiving the said notice of lien for freight, is required, before delivering the merchandise to the importer, owner, or consignee, to give seasonable notice to the parties claiming a lien, and containing the further provision that the possession of the goods by the officers of the customs shall not affect the discharge of such lien. Both the original section and the substitute contain the clause: "If merchandise so subject to a lien, regarding which notice has been filed, shall be forfeited to the United States, and sold, the freight due thereon shall be paid from the proceeds of such sale in the same manner as other charges and expenses, authorized by law to be paid therefrom, are paid." The district attorney insists that as no notice was given to the proper officer of the customs the case does not come within the provisions of the act, and no statutory authority can be invoked to pay the freight out of the proceeds of the sale. The counsel for the petitioners, on the other hand, contends that no notice was required, as none of the iron ore went into a public or bonded warehouse,

and that the merchandise, without notice, falls within the intention and spirit of the law. He regards the act as the expression of the legislative intent to preserve and give effect to the ship-owner's lien in all cases of forfeiture to the government, and quotes Potter's Dwaris on Statutes, etc., p. 144, in support of his position: "The intention of the legislature may be found from the act itself, from other acts *in pari materia*, and sometimes from the cause or necessity of the statute; and wherever the intent can be discovered, it should be followed with reason and discretion, though such construction seems contrary to the letter of the statute." But these are rules of interpretation; when the words of the law are obscure, and there is no obscurity in the act under consideration. I am not prepared to affirm that when congress explicitly gives to parties certain rights, upon their performance of certain antecedent acts and conditions, they are entitled to claim the rights, without showing that they have performed the acts and conditions.

But this question turns, in my judgment, upon other considerations, to which I shall now advert. There are a large number of statutes in both the customs and internal-revenue acts which subject property, used in violation of the law, to forfeiture. It is sufficient, for my present purpose, to divide these statutes into two classes,—one class forfeiting the offending *res* absolutely, without reference to liens of innocent holders, or the claims of *bona fide* purchasers without notice; and the other only condemning the interest of the guilty owner, and preserving the rights of honest lienors or purchasers. Most of the sections for forfeiture, under the internal-revenue laws, belong to the former class, and many of those under the customs laws to the latter. Whether the statute falls within one class or the other depends upon the phraseology used by congress in its enactment. Where it makes the forfeiture absolute, it is within the former class, and the forfeiture is incurred at the time of the commission of the act which works the condemnation, and the title is vested in the United States from that date. No matter how long afterwards proceedings are taken to enforce the forfeiture, the right of the government runs back, by relation, to the time of the commission of the wrongful acts, and cuts out all intervening claimants, however innocent. But when a statute gives an alternative to the United States, either to forfeit the offending thing or its value by suit against the offending person, it comes within the latter class; because the government acquires no title to the property until its proper officers make an election whether they will proceed against the *res* or against the offender for its value.

and in the mean time, pending the election, all *bona fide* encumbrances are protected. The question as to the time when the transfer of right in the thing forfeited takes place, was first fully discussed and settled in the case of *U. S. v. Grundy*, 3 Cranch, 338. Under the act of December 31, 1792, for registering and recording ships or vessels, (section 4143, Rev. St.,) it was provided that taking a false oath as to ownership forfeited the vessel or the value thereof. The suit was brought to recover the vessel in the hands of a *bona fide* purchaser, without notice of the fraud in the registry, on the ground that title had vested in the United States at the instant of the commission of the offence for which the forfeiture was claimed. Chief Justice Marshall, in delivering the opinion of the court, stated the question to be whether, by virtue of the act, the absolute property in the ship or vessel vested in the United States, either in fact or in contemplation of law, on the taking of the false oath, or remained in the owners until the United States should perform some act manifesting their election to take the ship, and not the value. He held to the latter view, and in his luminous way said:

"It seems to be of the very nature of a right to elect one of two things: that actual ownership is not acquired in either until it be elected, and if the penalty of an offence be not the positive forfeiture of a particular thing, but one of two things, at the choice of the person claiming the forfeiture, it would seem to be altering materially the situation in which that person is placed to say that either is vested in him before he makes that choice. If both are vested in him it is not an election which to take, but which to reject. It is not a forfeiture of one of two things, but a forfeiture of two things of which one only can be retained."

This construction of the class of statutes which forfeit the property with an alternative of its value, was acquiesced in by the attorney general of the United States in the discussion of the case of *1,960 Bags of Coffee*, 8 Cranch, 398, and was afterwards deliberately reaffirmed in *Caldwell v. U. S.* 8 How. 366, where the supreme court reached the necessary conclusion of such a construction, by holding that any rights in the forfeited property, acquired in good faith by third persons, after the offence and before the date of the election, were not divested by the decree of condemnation. It will not be suggested, after the case of *The Siren*, 7 Wall. 152, that the government stands in any different relation to the money in the registry than do private suitors, except that it is exempt from the payment of costs. It will be seen, by reference to the sections (2839, 2864) under which the ore was condemned, that they are both in the alternative. The United States had an election, in either case, whether to forfeit the merchandise, or

to recover its value by suit against the persons making the false and fraudulent entry. They chose the former proceeding; but, in the mean time, the owners of the steamer, without knowledge of any offence, committed or premeditated, earned the freight which was agreed to be paid for its transportation, and ought not now to be refused its payment from the proceeds of the sale of the forfeited property.

Let an order be entered directing the clerk to pay to the petitioners the sum of \$1,305.61 out of the proceeds in the registry.

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SAWYER v. KELLOGG.

(Circuit Court, D. New Jersey. November 19, 1881.)

1. TRADE-MARKS—ACCOUNTING.

K., who was engaged largely in the business of packing blues, on his own account and for others in the trade, put up the blues covered by the infringing trade-mark for the firm of B. & Co., who sold them, paying K. for the work and labor of packing them. K. was adjudged an infringer, an injunction issued against him, and the decree directed an accounting. On motion to strike from the decree the clauses directing an accounting, *held*, that the complainant was entitled to an accounting to enable him to ascertain what profits were made by K. by his work and labor, and what damages resulted therefrom.

2. COSTS.

In trade-mark cases the ordinary rule is that a decree for an infringement and an injunction carries costs; and this rule applies, though no demand was made before suit that the defendant should cease to use the infringing trade-mark.

On Motion to Amend Decree.

*George Putnam Smith*, for the motion.

*Rowland Cox*, *contra*.

NIXON, D. J. This is a motion to strike from the decree entered in the above case the clauses which direct an accounting and the payment of costs.

1. As to the accounting. The counsel for the defendant rests his application to strike out on two grounds: *First*, because the proofs show that the defendant is not the person liable to account to the complainant. The evidence is that the defendant was largely engaged in packing blues on his own account and for others in the trade; that all the blues covered by the infringing trade-mark were put up by him for the firm of James S. Barron & Co., dealers in wooden ware, rope, and cordage in New York, who placed the same upon the market; that he made no sales to any one of the articles thus packed,

but received pay from his employers solely for the work and labor of packing. The bill of complaint prays for an injunction, and for profits and damages. Having been adjudged an infringer of the trade-mark of the complainant, an injunction has been issued against him. Under the above state of facts, should he be compelled to account for profits and damages? We have no doubt about the propriety of the reference or of the liability of the defendant, if it can be shown on the accounting that profits were made by his work and labor, or that damages resulted to the complainant therefrom. If he did not sell, the profits on the sales are not chargeable to him; but if any profits came to him for preparing the article for those who did sell, they belong to the complainant, and the object of the accounting is to ascertain that fact. And if the defendant has damaged the complainant by the unlawful use of his trade-mark, the nature and extent of the damage is a proper subject of inquiry. *Second*, because the complainant has forfeited his right to an account by laches in bringing his suit. In England the rule is stringent in trade-mark cases that lack of diligence in suing deprives the complainant in equity of the right either to an injunction or an account. Our courts are more liberal in this respect. A long lapse of time will not deprive the owner of a trade-mark of an injunction against an infringer, but a reasonable diligence is required of a complainant in asserting his rights, if he would hold a wrong-doer to an account for profits and damages. This rule, however, applies only to those cases where there has been an acquiescence after a knowledge of the infringement is brought home to the complainant. Such is not the present case. Although the defendant began the packing of bluing in the packages complained of early in the year 1878, there is no evidence that the complainant knew it until a short time before the suit was brought.

2. As to the matter of costs. We find nothing in this case to take it out of the ordinary rule that a decree for an infringement and an injunction carries costs. The only reason suggested by the counsel for the defendant was that no demand was made before suit that the defendant should cease to use the label. We have never understood that in such cases a demand was necessary, nor that an infringer, who stoutly contests the suit to the end, should be relieved from the payment of the costs which have been incurred in consequence of his wrong-doing and his litigation.

The motion to strike out is overruled, but, under the circumstances, without costs, on the motion, to the complainants.



## MILLER &amp; WORLEY v. FOREE &amp; Co.

*(Circuit Court, D. Kentucky. 1881.)*

## 1. LETTERS PATENT—PRIOR DISCOVERY AND USE.

Prior discovery and successful use of the patented process is a complete defence to a suit for infringement brought by the patentee.

## 2. SAME—TOBACCO PLUGS.

The invention of a process for finishing and marking tobacco plugs, claimed by Miller & Worley in reissued letters patent No. 8,060, dated January 29, 1878, was anticipated by Ed. F. Smith.

*Geo. Harding, Stem & Peck, and Beattie & Winchester*, for plaintiffs.  
*S. S. Boyd*, for defendants.

BAXTER, C. J. Complainants sue for an alleged infringement of reissued letters patent No. 8,060, issued to them on the twenty-ninth of January, 1878.

The invention claimed consists of a process for finishing and marking tobacco plugs with an ineffaceable identifying impression by one and the same pressure, by means of compress plates, with draws in relief, whereby the tobacco takes a permanent set, with the impression in it, and in a finished state; the tobacco having been previously prepared by a forming pressure in the molds. The patent contains two claims: *First*, the described process of marking plug tobacco, which consists in impressing letters or other marks directly into the side of the plug during the process of manufacture, and by the pressure employed in making the plug, substantially as described; *second*, a tobacco plug marked with an impression, substantially as described.

The defendants, among other defences, allege that Miller & Worley, the parties named in the original patent as the first and original discoverers of the patented process, are not the original discoverers thereof, and aver that said process was understood and applied by the several parties named in the answer before its discovery and use by Miller & Worley. The case, as it was then presented, was heard by me more than a year ago, when a decree was entered sustaining the first claim of the patent, adjudging defendants guilty of infringement, granting an injunction, and ordering an account of profits, etc. But before the account was taken I granted a rehearing to enable defendants to put in additional and newly-discovered evidence to sustain this defence of prior discovery and use of the process secured by complainants' patent. Further evidence was accordingly adduced by both parties bearing on this issue, the most important of which is found in the depositions of Ed. F. Smith and Robert E. Lee.

The object of these depositions is to show that the patented process had been discovered, matured, and successfully used by Smith

before it was discovered by the patentees. If the depositions of Smith and Lee, his foreman, are true, the defence of prior discovery and use is well sustained. But are these depositions reliable? The witnesses have been severely attacked and successfully impeached, in so far as evidence assailing the general character of a witness can discredit their testimony. But this successful assault upon the general character of these two witnesses does not necessarily exclude their testimony from consideration. The law recognizes the possibility of a witness of general bad character telling the truth, and therefore permits such witnesses to testify,—their evidence to be received for whatever, under the circumstances of the particular case, the tribunal charged with the duty of passing on and deciding the facts may deem it worth. It therefore becomes our duty to consider and decide how much weight ought to be given to the testimony of these witnesses, as against the *prima facie* case made by the patent itself. The patent is evidence of its own validity, and hence the burden of proof to invalidate it rests upon the defendants. Every reasonable doubt ought to be resolved against them, and if, proceeding on this hypothesis, it shall be found that Smith's alleged discovery, etc., was incomplete, and resting on speculation and experiment only, or that the evidence on this point is evenly balanced, it cannot avail to defeat complainants' patent. Let us now examine the testimony and see how the fact in this regard is.

As preliminary to the main question, it is perhaps proper to remark that the defendants on the former hearing contended that complainants' patent had been anticipated by English and American patents, issued to other parties. But this defence was rejected as untenable. I still adhere to the opinion then expressed. Although said several anticipating inventions had been successfully used in marking soap, tobacco, and other substances, with the names of the manufacturers, or with such other trade-mark or identifying mark as the manufacturers chose to impress on the product of their labors, neither of such inventors had conceived or clearly developed the precise process which constitutes complainants' discovery. But these prior discoveries reflected more or less light upon this general subject, if they did not distinctly suggest the identical idea which constitutes complainants' invention. The surprise is, therefore, not that Smith should have blundered upon the same thought, but that the thing patented had not occurred to some one at an earlier date.

Smith says that he did conceive the idea, and proceeds to detail the different steps taken to develop it. He was a manufacturer in a

small way, at a remote place in Arkansas, of plug tobacco. Both his means and facilities for carrying on his business were exceedingly limited. He used wooden moulds, and finding that the faces of his moulds were such as to leave the tobacco with a rough finish, he made an effort to remedy the matter by plating the moulds with metal plates fastened on by screws; and discovering that, when the moulds thus plated were used, the screw-heads made an impression upon the finished tobacco, he conceived the idea of marking the tobacco with his name, and began at once a course of experiments to mature and develop the thought and apply it to practical use. But he found difficulty in giving a satisfactory finish to the tobacco and making the impression permanent. At this point Lee, his foreman, came to his assistance, and advised him to buy a finisher. Thereupon Smith ordered a finisher from a firm in Louisville, whose name is given, and after further consultation with Lee and one G. W. Davidson, a jeweler, he employed the latter to make him two zinc plates, with the letters of his name raised thereon, which he occasionally used in marking two tobacco plugs out of the 180 plugs in each finishing process, at intervals, from August, 1875, to April, 1876, at which last-named period his factory was seized by the government and his business suspended.

Now if, as has been stated, Smith's evidence is true, the process so discovered and applied by him is a clear anticipation of complainants' discovery. The explanation, and the manner in which it has been told, are well calculated to impress one with confidence in its truth. Besides, he is confirmed in every material particular by Lee.

But complainants have examined quite a number of witnesses, who, in addition to testimony impeaching the general character of both Smith and Lee, testify that they bought and sold tobacco manufactured by Smith during the period mentioned, and that they had no recollection of having seen any plug of tobacco marked with Smith's name. This evidence is, notwithstanding its negative character, entitled to a good deal of weight.

But defendants rejoin, first, by argument and then by evidence. Their argument is that Smith, being a manufacturer in but a very small way, using his plates for marking only at intervals, and then only marking, say, one or two plugs out of 180 in each finishing process, it is not unreasonable to suppose that Smith may have marked tobacco in the manner and by the process described by him, and that none of the witnesses examined by complainants should have noticed any of the marked plugs. And, by way of further rejoinder,

the defendants have adduced other and corroborating evidence that has not been questioned. Davidson, who made the marking plates for Smith, and who is shown to be a reputable man, has been examined by defendants, and on his examination testified that he had, at or about the time alleged, at Smith's instance and request, made such plates for Smith as herein previously described; and his testimony is confirmed by the production of one of said plates, which bears every indication of genuineness, and is identified by Smith, Lee, and Davidson as one of the plates made by the latter and used by Smith in his business. There is, in fact, no ground on which to doubt the truth of this part of the evidence. If, then, said plate was made at the time and for the purpose mentioned, it follows, as the night follows the day, beyond all reasonable doubt, that it was so used.

But this is not all. The conclusions reached and announced in the preceding paragraph are confirmed by the positive testimony of other witnesses. Thomas Y. Huddleston, who was at the time of his examination, and for nearly eight years prior thereto, sheriff of his county, and who, so far as this record discloses, notwithstanding the attempt to impeach his credibility, is a reputable citizen, testifies that he had purchased plug tobacco from Smith about that time with Smith's name impressed upon it; and he is confirmed by M. W. Wright, one of complainants' witnesses, who, on cross-examination, says that Smith showed him two plugs of tobacco so marked, which Smith at the time represented to be his work. This evidence, supplementing, as it does, the testimony of Smith, Lee, and Davidson, makes a clear case of anticipation.

Yet complainants contend that Smith never perfected and reduced his alleged discovery to any practical use; that it was merely experimental and incomplete; and, in support of this theory, they further insist that Smith could not, and did not, impart as fine a finish to his tobacco as was given to the tobacco finished under complainants' process; and that for this and other insuperable difficulties in his way he abandoned the invention in an incompleated condition.

I cannot, however, concur in this view of the facts. Smith discovered the "process." This he seemed thoroughly to understand, and having applied it successfully to one or two plugs, it required no inventive genius to apply it to others. It is not important that he did not do this. He did not have the necessary facilities, nor the means with which to obtain them. Besides, the seizure of his factory by the government, some eight months after his first experiment was

made, constrained him to abandon the prosecution of the idea. But he did not so abandon it until he had fully developed the *process*, and until it was understood by himself, Lee, and Davidson; and this, we think, is enough, under the authority of *Coffin v. Ogden*, 18 Wall. 120, to supersede and overthrow complainants' patent.

A decree will be entered dismissing complainants' bill with costs.

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CROSS v. LIVERMORE.

(Circuit Court, D. Rhode Island. 1881.)

**1. LETTERS PATENT—STYLOGRAPHIC OR FOUNTAIN PENS—PRELIMINARY INJUNCTIONS.**

A preliminary injunction will be refused where grave doubt exists, on the evidence, whether there has been any infringement, and there is some doubt as to the validity of the patent. Hence, a motion for a preliminary injunction, made by Alonzo T. Cross, as the patentee of letters patent Nos. 199,621 and 227,416, and reissued letters patent No. 9,716, for improvements in stylographic or fountain pens, against Charles W. Livermore, is denied.

**In Equity.** Motion for preliminary injunction.

*Saml. J. Elder*, for complainant.

*Oscar Lapham and Benj. F. Thurston*, for defendant.

**COLT, D. J.** This is a motion for a preliminary injunction. It is claimed by the complainant that the defendant has been guilty of an infringement of certain patents issued to him for improvements in stylographic or fountain pens. The inventions of the complainant, as set out in his several letters patent, are for certain improved combinations of several parts or elements, whereby a more perfect pen is secured.

In entering upon the consideration of a proceeding of this character, we are to bear in mind—*First*, that whenever, upon the facts presented, a fair and reasonable doubt exists as to whether the defendant has actually been guilty of an infringement, or when it does not satisfactorily appear that the complainant is the first and sole inventor of the improvements claimed, a preliminary injunction will be refused. *High, Inj.* § 606; *Dodge v. Card*, 2 Fish. 116; *Parker v. Sears*, 1 Fish. 93; *Thomas v. Weeks*, 2 Paine, 92. *Second*, that if an alleged infringer uses less than all of the elements of a combination, and substitutes something for the part which he omits, there is no infringement, unless the substitute is a mere mechanical equiv-

alent. *Densmore v. Schofield*, 4 Fish. 148; *Prouty v. Ruggles*, 16 Pet. 341; *Eames v. Godfrey*, 1 Wall. 78.

The complainant maintains, in the first place, that the defendant's pen is an infringement of claims 1, 2, and 4 of reissued letters patent No. 9,716, which are as follows:

"(1) In a fountain pen, the combination of a tubular point, a spindle adapted thereto, and connected to an independently-moving spindle carrier, said spindle carrier being adjustable in relation to a fixed part of the pen, whereby the movement of the spindle may be changed, and the wear thereof compensated, as set forth. (2) The combination of the spindle carrier, C, loosely-attached spindle, B, and ink-delivery tube, A, substantially as described. (4) The combination of the spindle carrier, C, spindle, B, and adjusting screw, E, substantially as described."

It is not contended that Cross was the inventor of the principal elements of the fountain pen, such as the air tube, gravitating valve, spindle or needle, etc.; but the improvements worked out by Cross in this patent are, in brief, putting a screw in the upper end of the valve or carrier to regulate the rise of the valve from its seat; putting a screw in the lower end of the valve or carrier to regulate the length of the needle; and attaching the needle to the valve by a swivel joint, to give a freer play to the needle. A glance at the defendant's pen shows that it is different in form and construction. The valve which regulates the supply of ink in the complainant's pen being raised by pressing the point of the spindle or writing pen upon the paper, thus letting in the ink, and which falls by the action of gravity upon its seat, when no such pressure is exerted, thus cutting off the flow, and which was deemed indispensable in all the earlier fountain pens, is done away with in the pen of the defendant. A spiral spring, to which the needle is attached, is substituted, and this spring inserted in a small tube, which is securely held by a supporting post. No screw is attached to the lower end of the spring to regulate the length of the needle, and it is questionable, to say the least, whether the screw at the upper end of the spring, which serves to plug up at that end the small tube which holds the spring, performs the same function as in the complainant's patent.

A combination which includes as one of its principal elements a valve or spindle carrier of the kind described in the above claims in the complainant's invention, can hardly be said to be the same as a combination which dispenses with this, and substitutes another element of entirely different character, not to mention other less important changes in the construction of defendant's pen. Grave doubt,

therefore, exists whether the defendant has been guilty of an infringement of this patent.

The complainant further contends that the defendant's pen is an infringement of the first claim in another patent granted to him, No. 199,621, dated January 29, 1878, which is in the following language:

"I claim as my invention (1) the vibrating pin, D, and spring, F, combined with an air tube, B, case, A, and tube, H, substantially as described."

Just before this the specification states:

"The attachment of the pin, D, to the lower end of the air tube, B, so as to be operated by means of a spring, substantially as shown and described, being the gist of my improvement."

The improvements here made are the substitution of the spring for the valve, and the attachment of the pin to the air tube in the manner described in the patent.

It cannot be denied that the defendant's pen much more nearly approaches this construction than that of the complainant's first patent, and the question of infringement is therefore a closer one. The defendant's pen has a vibrating pin or needle, which is operated by means of a spiral spring; but the pin, instead of being attached to the air tube in the manner set out in complainant's patent, is entirely separated from it,—a supporting post, below the air tube, holding firmly a small tube containing the spring, and the upper end of the pin or needle. Can a combination which dispenses with the attachment of the pin to the air tube, and the device by which such attachment is made, and which substitutes for this a supporting post, whereby the pin and spring are cut off entirely from the air tube and the upper section of the pen, be considered an infringement of the complainant's claim?

The defendant, Livermore, derived this supporting post by assignment to him of the patent of G. F. Hawkes, for improvement in fountain pens, No. 236,222, dated January 4, 1881. It is claimed that this construction is superior to the complainant's, because, by being able to entirely disconnect the upper from the lower section of the pen, and by this means to confine the delicate machinery of the spring and pen within the lower section, there is much less liability to injury from exposure when filling, and that it is also more easily cleaned.

If the attachment of the pen to the air tube is a substantive part of the complainant's invention, and if for this part the defendant substitutes something else, which is not a mere mechanical equivalent, viz., the supporting post, there has been no infringement. To say that this attachment is not a material part of the patented combination, considering its importance in the arrangement, and the language of the specification, would, we think, be going too far. At least, the point is sufficiently doubtful to dispose of this motion, whatever may be the final conclusion after a full hearing.

Again, it is charged that the defendant has infringed another patent granted to the complainant, dated May 11, 1880, and numbered 227,416, wherein the claim is,—

"In a stylographic fountain pen, a spindle having a tip of indium, or like hard substance, in combination with a tubular point of comparatively soft metal, the spindle being arranged in the point to project slightly and bear upon the paper, substantially as set forth."

The defendant, in answer to this charge, introduces affidavits seeking to show prior use or knowledge by others before the invention. The complainant, Cross, states in his affidavit "that he is unable to give the exact date of his invention, but it was probably in the spring or summer of 1878." On the other hand, the defendant produces the affidavits of James M. Clark, a manufacturer of fountain pens, and of Charles H. Court, an employe, who swear to a similar use of indium upon other fountain pens prior to the middle of 1877.

James M. Clark says:

"The pens in which the indium-tipped needle was used all had a tubular point, from which the needle projected, composed of metal much softer than the indium, and the needle had an endwise movement, and was arranged in the point to project slightly from or beyond the end of the tubular point and bear upon the paper."

In the affidavit of Charles H. Court we have also a similar description of the use of indium, both statements detailing the same use in substance as that specified in complainant's patent.

Judging from the evidence before the court, we cannot but say that some doubt is thrown upon the validity of this patent. A fuller investigation may, of course, dispel this. While it is unquestionably true that, these things being proved,—namely, a patent, long possession, and infringement,—the party is entitled, *prima facie*, to an injunction; yet even where this is shown the question will be, in cases of opposing evidence, whether this right has been displaced by the



respondent. Curtis, Law of Patents, § 414. Long possession, however, can hardly be set up here, nor are former recoveries claimed.

Upon the whole, we are of the opinion that the complainant has not made out a case, under the evidence submitted, that would warrant the granting of a preliminary injunction, and the motion is therefore denied.

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ILLINGWORTH v. SPAULDING.

DOYLE v. THE SAME.

(Circuit Court, D. New Jersey. December 24, 1881.)

1. LETTERS PATENT—SUIT FOR INFRINGEMENT—DEFENCE.

Whether a knowledge, by persons residing in this country, of a foreign use of a patent is a defence to a suit for infringement, *quære*.

In Equity.

*J. C. Clayton*, for complainant.

*A. Q. Keasbey and Francis Forbes*, for defendants.

NIXON, D. J. Two motions are made in the above-stated cases, which, however, involve the same question. The defendants move that they be allowed to amend their answer, in the case of *Illingworth v. Spaulding*, by inserting the following allegation :

"That the said letters patent No. 166,700 [on which the suit of the complainant is founded] are void, for that the same thing, or every material part thereof, claimed therein as new, was, prior to the date of the said alleged invention by the said John Illingworth, known to the following-named persons in this country, viz.: John Hogan, who resides in the city of Brooklyn, state of New York, by whom it had been used in the city of Sheffield, England, and who knew of its use by J. & Riley Carr & Co. at said city of Sheffield, England. \* \* \*

Other names are inserted, averring the same knowledge in substantially the same language.

The complainant moves, in the case of *Doyle* against the same defendants, to strike out similar allegations in the answer filed therein.

It was intimated upon the argument that the object of making and arguing these motions, at this stage of the proceedings, was to obtain the ruling of the court upon the question whether such averments, if proved, would be regarded as a defence in a suit for infringement.

The precise question to be determined is the meaning of the expression "known or used in this country," as it occurs in section

4886 of the Revised Statutes. The words "known or used" have been employed in all the patent laws from the first act, passed April 10, 1790, down to their latest general revision, July 8, 1870; but the other words of the phrase, "in this country," were not added until the last-named act was passed. Why were they inserted, and what restrictions were they intended to impose?

The aim of the section is to define what inventions or discoveries are patentable, and congress has used therein the following language:

"Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new or useful improvement thereof, *not known or used by others in this country*, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, and not in public use or on public sale for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon the payment of the fees required by law, and other due proceedings had, obtain a patent therefor."

It is an elementary principle in the construction of a statute that the meaning of one part is to be discovered or deduced from a view of the whole. Hence, if one part be doubtful or obscure, the proper way to ascertain the intent is to consider the other parts of the act,—the words and meaning of one frequently leading to the sense of another. Dwaris, St. 188.

Are there any other provisions in the law which throw any light upon the meaning of the above-quoted section? Under the fourth subdivision of section 4920 the defendant, in an action for infringement, is authorized to prove on the trial that the complainant was not the original and first inventor or discoverer of any material or substantial part of the thing patented; but this must be done, subject to the limitations imposed by section 4923, which provides that whenever it appears that a patentee, at the time of making his application for the patent, believed himself to be the original and first inventor or discoverer of the thing patented, the same shall not be held to be void on account of the invention or discovery, or any part thereof, having been known or used in a foreign country before his invention or discovery thereof, if it had not been patented, or described in a printed publication.

This provision also appeared in the fifteenth section of the act of July 4, 1836, and since that date the courts have uniformly held that no prior use in a foreign country of an invention invalidated a patent granted here, unless the invention had been patented, or described in some printed publication. *O'Reilly v. Morse*, 15 How. 62; *Hays v. Sulzor*, 1 Fish. 532; *Judson v. Cope*, Id. 623; Curt. Pat. § 99.

In the amendment proposed a foreign use of the patent is set up, which, in itself, is an immaterial fact. But the offer goes further, and includes proof of a knowledge of such use by persons residing in this country. This suggests a defence different from that of a foreign patent, or of a description in a printed publication, and one, I believe, that has never been adjudicated. The nearest approach to it is the case of *Judson v. Cope*, *supra*. A careful examination of the questions raised on the trial leads to the conclusion that the learned judge who presided was inclined to regard as tenable the defence here proposed. A witness named French was on the stand, and the defendants' counsel asked: "Have you any knowledge of such valve being known and used prior to 1850 by James Watt, at his manufactory in Birmingham called Soho?" The question was objected to for want of sufficient notice under the statute, inasmuch as the notice had not stated "who had knowledge" of the use of the valve by James Watt, but stated simply that it had been used by him at the place named in the interrogatory. The judge said that the question was new, and although he had serious doubts whether any proof was competent to render void an American patent, except that it had been patented abroad, or had been described in a printed publication; yet, in speaking of the defective notice, he said:

"If the averment had been that the witness French, residing at a certain place described, had knowledge of the fact that James Watt had known and used this invention in England, perhaps the proof would be competent. If the notice had averred that this witness had knowledge of the use of this invention at Birmingham at the time stated, the question perhaps might be admissible."

But we are not willing to attempt to determine a question so important upon a motion to amend a pleading. Without expressing any opinion, we have concluded to allow the amendment proposed in the case of *Illingworth v. Spaulding*, and to deny the application to strike out in the case of *Doyle v. Spaulding*. This leaves the matter within the record to be decided upon the final hearing, and gives to either party the benefit of an appeal, if the decision here should be unsatisfactory.

## THE JAMES JACKSON.\*

*(District Court, S. D. Ohio, W. D. November 25, 1881.)*

## 1. TOWING—COMMON CARRIER.

*Semble*, that a steamboat engaged in towing a barge is not a common carrier.

## 2. TOWING-BOAT—BOUND TO REASONABLE SKILL AND CARE.

Although not held to the responsibility of a common carrier, the towing-boat is bound to the exercise of reasonable skill and care in everything pertaining to its employment.

## 3. SAME—SAME—SPECIAL CONTRACT—NEGLIGENCE.

*Semble*, that a boat engaged in towing a barge cannot relieve itself by contract of the consequences of its own negligence.

## 4. SPECIAL CONTRACT—BURDEN OF PROOF.

The burden of proving a contract that the barge was to be towed at the risk of its owner, is upon the towing-boat asserting such contract. In this case, *held*, that there was no contract to relieve the towing-boat of the consequences of its negligence.

## 3. TOWING—BARGE OF OIL IN BULK—NEGLIGENCE—CASE STATED.

A steam-boat agreed to tow a barge, loaded with oil in bulk. The barge was new, and properly adapted to the purpose for which it was used. The barge sprung a leak and a considerable quantity of oil ran out upon the water or ice. This was probably caused by negligence of the towing-boat in handling the barge; but, whether that was the fact or not, those in charge of the towing-boat knew of the leak, and without examination as to whether the surface of the water was covered by oil, a shovel of fire ashes was thrown out upon the water, which ignited the oil and blew up the boat. *Held*, to have been negligence, and that the towing-boat was liable for the damage.

## In Admiralty.

*Lincoln, Stephens & Slattery*, for libellant.*Moulton, Johnson & Levy* and *W. H. Jones*, for respondent.

SWING, D. J. The libellant claims—

That on the twenty-first day of December, A. D. 1878, he was the owner of the barge Rice No. 1 and her cargo, consisting of 2,327 barrels of oil; that the barge was built expressly for towing oil in bulk; that it was new, and in every respect suited for such business; that the steam-boat James Jackson, through her owners, on the twenty-first day of December, 1878, agreed to tow said barge and her cargo from Pittsburgh, in the state of Pennsylvania, to Marietta, in the state of Ohio, and there safely deliver said barge and her cargo to the libellant for the sum of \$45; that said barge and cargo were delivered to said steam-boat and taken charge of by her Saturday afternoon, December 21, 1878, at Pittsburgh, in pursuance of said contract; that said barge was, at the time, well and properly loaded, and was right and sound in every respect, and in good order and condition; that said boat did not deliver said barge and cargo as she agreed to, and did not proceed steadily upon her voyage, but laid up on Sunday night at New Cumberland, West Virginia, and

\*Reported by J. C. Harper, Esq., of the Cincinnati bar.

afterwards so carelessly towed said barge and navigated their boat that they caused said tow and barge to be grounded in the Ohio river, at Brown's island, about five miles above Steubenville, Ohio, and also carelessly and negligently grounded said barge at the public landing at Steubenville; that said boat had a large tow, and carried an insufficient crew for its proper and skilful management, and delayed in leaving the port of Pittsburgh, and did not leave with their tow as they agreed to, and did not reach Steubenville, Ohio, with their said barge and cargo until Wednesday, December 25, 1878, about noon, and laid up there and put said barge and cargo just below and behind the steam-boat Oella, and the steam-boat James Jackson was also lying close to said barge and her cargo; that the said steam-boat, her officers and crew, so carelessly and negligently managed said barge and her cargo that, by their carelessness, said oil caught fire and exploded and burned up, whereby the barge and her cargo became a total loss; that said oil was worth \$3,465.40, and said barge and outfit worth \$1,250, making a total of \$4,715.40.

To this libel the owner of this steam-boat, Andrew Lyons, answers, setting up three defences:

(1) That the seizure of the steam-boat was made south of a line of low-water mark on the West Virginia side, and therefore this court is without jurisdiction; (2) that by a special agreement between the parties the libellant was to assume all risks in the transportation of the oil; (3) denies that the barge was properly loaded, or that it was in a proper condition, and denies all negligence alleged.

In argument it was claimed that the steam-boat, in the performance of the service of the contract, was not a common carrier, and was not, therefore, subject to the rules of law governing common carriers in this: that she was not held to the highest possible degree of care and skill, and that she might contract to carry at the risk of the shipper. That the steam-boat engaged in towing a barge is not a common carrier would seem to be settled by the authorities. *Steamer Webb*, 14 Wall. 406; *The Margaret*, 94 U. S. 494; *Desty*, Shipping & Admiralty, 333.\* Although not a common carrier, the steam-boat which engages to tow a barge is bound to the exercise of reasonable skill and care in everything relating to the work of towing the barge until the work is complete. Such being the relations and obligations of the steamboat in relation to the contract in this case, it is claimed by the respondents that it was perfectly lawful for them to provide that the towing of the barge should be at the risk of the owners thereof.

\*See the recent case of *Mann v. White River, etc., Co.*, 8 N. W. Rep. 550, in which the supreme court of Michigan decided that log-driving and booming companies are not common carriers; and the excellent note of Mr. Ewell thereto, as to what constitutes a common carrier, in 20 Am. Law Reg. (N. S.) 734, 737.—[REP.]

That there is a marked difference between the obligations, duties, and responsibilities of a common carrier and a private carrier needs no citation of authority to establish; nor is it necessary in the present case to enter into any discussion in regard to wherein the difference consists. But just how far each may, by special contract, protect itself against the obligations, duties, and responsibilities is not quite so clear.

In *Railroad Co. v. Lockwood*, 17 Wall. 357, Justice Bradley, after a close and exhaustive examination of the authorities, and an able discussion of the principles governing common carriers, announces, as the decision of the supreme court of the United States, that they cannot exempt themselves by contract from responsibility for the negligence of themselves or their servants. In the *Steamer Syracuse*, 12 Wall. 167, it was a contract of towage, as the present, and it was claimed, as in the present case, that by special agreement between the canal-boat and the steam-boat, the former was being towed at her own risk. Justice Davis, in delivering the opinion of the court, says:

"It is unnecessary to consider the evidence relating to the alleged contract of towage, because if it be true, as the appellant says, that by special agreement the canal-boat was being towed at her own risk, nevertheless, the steamer is liable if, through the negligence of those in charge of her, the canal-boat has suffered loss. Although the policy of the law has not imposed upon the towing-boat the obligation resting upon a common carrier, it does require upon the part of the persons engaged in her management the exercise of reasonable care, caution, and maritime skill; and if these are neglected, and disaster occurs, the towing-boat must be visited with the consequences."

It is contended by the learned counsel for the respondent that the doctrine of the latter case is modified by the decision in the former. Whether this be so or not, the view which I take of the evidence in regard to the contract alleged renders it unnecessary to determine. The contract is affirmed by the respondent and denied by the libellant, and the burden of showing the existence of the contract and its terms rests upon the respondent. The respondent says that the words used were that he "would take no responsibility," and the captain sustains the statement of the respondent; but he is very clear that the respondent did not understand that this contract relieved him of responsibility for carelessness and negligence, for, to the question, "Your idea is that you were not responsible for the carelessness of your men?" he says, "I want to say that I am subject to whatever law governs these things. I did not make a contract to cover any care-

lessness or negligence. Accidents will happen among the most careful. I have had my works blown up five times and I was there myself."

This brings us to the consideration of the question whether the loss of this oil and barge was the result of negligence or carelessness on the part of those connected with the boat. In the first place, the proof clearly shows that the barge was a new and substantial one, properly fitted and prepared for the holding and transporting of a cargo of oil in bulk, and there is no testimony that shows that the accident occurred either directly or remotely from any fault which existed in the barge at the time the boat received her in tow. As to how the accident occurred I think there can be little doubt. It is shown by the evidence that a leak was discovered in the barge; that quite a stream of oil was pouring out upon the water or ice, and by the testimony of two men (Tucker and Parrish) that Tucker thoughtlessly threw out a shovel of fire ashes, which caught the oil upon the water, and the oil on the water took fire and ran to the barge, which blew up; and it would seem, from the testimony of Snider, that this was talked of among a portion of the crew as the cause of the loss after it had occurred. The character of these witnesses is not directly impeached. I know that there is a large amount of evidence from experts and scientific men to show the improbability of a shovel of fire ashes thrown upon the oil producing such a result, and yet they show that if flame were placed in contact with the oil upon water it might ignite. Who knows what flame may have been connected with these ashes and coals? No one. And the man who threw them upon the oil shows positively that the oil did take fire from them, and that this produced the loss. Was the act which produced this such want of care as to make the steam-boat liable? It is not clear what produced the leakage of the oil,—whether from a want of proper care the barge grounded, in the ordinary sense of the term, or whether it had grounded upon a cake of ice; from the weight of evidence it would seem that from one of these causes the leak was produced, and that ordinary care and watchfulness might have prevented it. But if this were not so, the leak, in fact, existed; the oil had run out in considerable quantities, and would have found its way to the boat. Those in charge of the boat knew of the leak, and, under such circumstances, without any examination to see if the surface of the water was not covered with the oil from the barge to the boat, a shovel of fire ashes is thrown upon the water, which ignited the oil and blew up the boat. As I view it, this was the want of such care as would make the

steam-boat liable. I may be mistaken in my views, but if so I am glad to know that it is a case which can be appealed to the circuit court, where any errors of mine may be corrected.

Decree for the libellant.

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PENNSYLVANIA RAILROAD CO. v. GILHOOLEY.\*

(District Court, E. D. Pennsylvania. November 11, 1881.)

1. JURISDICTION—ENFORCEMENT OF DECREE OF FOREIGN COURT.

A court of admiralty may, at the instance of a party and without letters of request, enforce a decree *in personam* for the payment of costs rendered by an admiralty court in another district.

In Admiralty.

Libel by the Pennsylvania Railroad Company against William Gilhooley, setting forth that in December, 1876, respondent had filed his libel in the United States district court for the southern district of New York, against the present libellant, to recover damages for injuries to his canal-boat; that the said district court entered a decree in his favor; that this decree was afterwards, upon appeal, reversed by the circuit court for said district, and a decree was therein entered dismissing the libel, with costs, which were taxed at \$2,352.05. A copy of this decree was annexed to the libel. The libel further set forth that the said last-mentioned decree remained in full force and unsatisfied; that neither the present respondent nor any of his property could be found within the jurisdiction of the circuit court for the southern district of New York, but that such property could be found within this district. Libellant prayed for a decree against respondent for the amount of the decree entered in the circuit court for the southern district of New York. Respondent filed exceptions to the libel on the grounds (1) that the court had no jurisdiction; and (2) that the record of the suit in the courts of the southern district of New York was not attached to the libel. At the hearing it was agreed that these exceptions should stand as an answer.

George P. Rich, for exceptions.

A court of admiralty will lend its aid to enforce the decree of a foreign admiralty court only upon receipt of letters rogatory or missive, and not at the instance of a party. 6 Viner, Abr. 512, pl. 12; *Jurodo v. Gregory*, 1 Levinz, 267; S. C. 1 Ventris, 32; Godb. 260; 2 Bro. Civ. & Ad. Law, 120; 2 Sir Leoline Jenkins, 714, 754, 762, 788; *La Madonna della Lettera*, 2 Haggard, 289. The only reason that courts of admiralty interfere to execute each other's decrees is to prevent a failure of justice; but this reason is inapplicable to the present case, because an action of debt could be brought upon the judgment at common law. The cases in which admiralty courts have executed foreign decrees are either

\*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.



proceedings *in rem*, where the *res* had come into another jurisdiction from that in which proceedings had been commenced, or cases where a sentence of imprisonment for contempt, against a party for non-compliance with a decree, was asked for, in neither of which cases could relief be obtained at common law.

*Alfred Driver* and *J. Warren Coulston*, *contra*, were not called upon. They presented and relied upon *Penhallow v. Doane*, 3 Dallas, 97; *The Jerusalem*, 2 Gallison, 191; *The Centurion*, 1 Ware, 477; *Otis v. The Rio Grande*, 1 Woods, 279; *Wilson v. Graham*, 4 Wash. 53.

The court, (BUTLER, D. J.) in a verbal opinion, held that it had a general jurisdiction which would enable it in its discretion to enforce the decree of a foreign admiralty court, at the instance of a party, without letters rogatory, and, after directing that the record of the proceedings in New York, duly certified, should be attached to the libel, entered subsequently the following decree: "And now, November 11, 1881, the exceptions to the libel filed in the above cause having, by agreement of the respective proctors, and by leave of the court, been considered and filed as an answer to the libel, and the above cause having been heard on libel and answer, and having been argued by the proctors for the respective parties, and due deliberation being had in the premises, it is ordered, adjudged, and decreed, by the court, that the libellant recover against the respondent the sum of \$2,352.05, with interest thereon from the seventh day of February, 1880, said interest amounting to \$246.96, making in all the sum of \$2,599.01, with costs to be taxed by the clerk and that the libellant have execution therefor against the respondent."

## THE GENERAL TOMPKINS.

(Circuit Court, S. D. Mississippi. October, 1881.)

## 1. 2 REV. ST. MO. 1879, § 4225—LIENS.

By the provisions of 2 Rev. St. Mo. 1879, § 4225, debts contracted by the owner of a steam-boat on account of stores and supplies furnished for its use, and on account of labor done and materials furnished in repairing, furnishing, and equipping it, are made liens on the boat. *Held*, that one who furnishes money with which to pay off such liens has a lien on the boat to the amount of his advances.

## 2. CONSTITUTIONAL LAW.

Parts of the same statute may be valid, and other parts void.

## 3. LIENS UNDER STATE LAWS.

Liens given by the local law of the state of Missouri at the home port of the vessel will be recognized by this court.

In Admiralty. On appeal.

PARDEE, C. J. The intervenor claims proceeds in the registry of the court resulting from the sale of the steam-boat Gen. Tompkins, on the ground that under the laws of the state of Missouri the intervenor has a lien thereon by reason of having paid, at the request of the owner, debts contracted by the owner on account of stores and supplies furnished for the use of the said steam-boat, and on account of labor done and materials furnished in repairing, furnishing, and equipping the said boat. See 2 Rev. St. Mo. 1879, § 4225. The district court having allowed this claim of the intervenor, the owners have appealed.

1. It is objected that under the law of Missouri the intervenor has no lien, as he furnished nothing himself giving a lien, but only furnished money and paid off existing liens. It will be noticed that the wording of the statute is "for all debts contracted, etc., on account of stores and supplies, on account of labor," etc. Where the labor has been done, and the supplies, etc., furnished, and a lien results, it would seem that money used to pay off such liens would be on account of such labor and supplies furnished, etc. But the decisions cited from the supreme court of Missouri, on this question, leave no doubt. See *Bryan v. Pride of the West*, 12 Mo. 371; *Gibbons v. Fanny Barker*, 40 Mo. 254. In this last case the court says: "Money loaned for the specific purpose of enabling a boat to purchase supplies, or to pay wages or debts incurred already, or to be incurred in future, for things which are liens, have been held to be a debt contracted for those things, and therefore a lien also on the boat;" and

cites *Bryan v. The Pride of the West*, 12 Mo. 371; *The Gen. Brady*, 6 Mo. 558; *The Eureka*, 14 Mo. 532. I am of the opinion that under the Missouri law the intervenor had a lien.

2. It is objected that the intervenor has no lien that this court can recognize, because the Missouri lien law, under which the lien is made, is in conflict with the constitution of the United States. The remedy given by the Missouri law is, in all probability, unconstitutional. The cases cited—*The Moses Taylor*, 4 Wall. 411; *The Hine v. Trevor*, Id. 555; and *The Belfast*, 7 Wall. 644—are clear on this point. But I think the right given by the Missouri laws can be easily separated from the remedy given by those laws. Section 4225, entire, is not obnoxious, but is clearly within state authority, as recognized by the supreme court of the United States. See *The Lottawanna*, 21 Wall. 581, 582. The following sections of the Missouri statutes relating to priorities and remedies may be stricken out and this section will stand by itself.

3. It is also objected that the lien given by Missouri at the home port will not be recognized out of the state, and that this court ought not to recognize such a lien. No authorities are cited in support of this position save those cited in *Desty*, Adm. § 89, which probably were all cases of priority. In this circuit, where priority was not involved, such domestic liens have been recognized. See *Carroll v. Leathers*, 1 Newberry, 436; *The Katie*, 3 Woods, 182; and Judge Hill in this case. See, also, 1 Brown, Adm. 542.

4. It is further objected that the demand of the intervenor is prescribed as a lien under the law of Missouri, because no suit was instituted to enforce it within nine months from its creation. Section 4268 of the Revised Statutes of Missouri reads:

"All suits upon liens in any other than the first class shall be commenced within nine months after the true date of the last item in the account upon which the action is founded; and any failure to commence suit, as in this or the last preceding section required, shall discharge the boat or vessel from the lien of the demand claimed."

The demands for liens in this case are not within the first class referred to. No suit under this section has been instituted in Missouri at all; and the demand sued on here was filed June 1, 1881. It follows that all the liens claimed as arising nine months prior to that date are within the statute, and ceased to have any effect as against the Tompkins.

The libel of intervention and the evidence show that the debts

paid from which liens arose were paid from time to time from August, 1880, to October, 1880. Each payment constituted a separate lien, from which it follows that all payments made prior to September 1, 1880, had ceased to be liens on June 1, 1881, when the district court acquired jurisdiction. This settles all the claims made in the first article of the libel of intervention, as they are laid during August, 1880. Under the second article of the libel the claims are alleged as arising (and the exhibits show the fact) during the months of August, September, and October, 1880. Such as are of date prior to September 1st, are proscribed, and were dead liens when the libel was filed.

On this second article of the libel of intervention a reference is required to ascertain dates and facts. On the whole case appealed to an accompanying decree will be entered.

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#### THE LAURETTA.

(District Court, D. New Jersey. December 3, 1881.)

##### 1. ADMIRALTY—MARITIME LIENS—DELAY—WAIVER.

In the absence of any satisfactory explanation, delay in enforcing maritime liens, after a reasonable opportunity to do so, will be deemed a waiver of such liens, as against subsequent purchasers for value and without notice.

In Admiralty. Libel *in rem*.

A. Hugg, for libellant.

R. L. Jenkins, for claimant.

Nixon, D. J. This is a libel *in rem* for materials furnished and work done by the libellant on the schooner Laurretta, belonging to the port of Baltimore, at the port of Philadelphia.

The proofs show that in the month of August, 1876, while the vessel was at the city of Camden, in the state of New Jersey, certain materials were supplied and work performed for repairs upon her by the libellant, at the request of John McMurry, who was the legally-authorized attorney of the owner, Coleman Taylor, then residing at Baltimore, Maryland. The vessel continued the property of the said Taylor until the seventh of February, 1877, when she was sold to the claimant by bill of sale duly executed, in which there was a covenant that she was free and clear of all claims, demands, or encumbrances. By the terms of the sale the purchaser was allowed to retain in his hands two or three hundred dollars of the consideration money for the period of six months, as security against any secret liens or encumbrances. At the end of six months, no demands having been made against the vessel, the claimant paid over the residue of the purchase money to the vendor. After the beginning of the oyster season in Philadelphia, in the fall of 1877,

the libellant went to the Spruce-street wharf, where the vessel was then lying, and told the claimant that he had a claim against her for materials and work. No bill of items was presented. The only reply to this demand that seems to have been made by the claimant was: "There is the vessel. If she owes you anything attach her and make your money." No other claim was made, then or afterwards, and no steps taken to enforce a lien against the vessel until the libel was filed in this case, July 20, 1878, nearly two years after the debt was contracted.

Three facts appear quite distinctly in the proofs, all of which are important in the decision of the case:

(1) That during all the time which elapsed between the contraction of the debt and filing the libel, the vessel was engaged in the oyster trade at Philadelphia, and was not out of the Delaware river and bay; (2) that the libellant knew of the sale of the vessel to the claimant, about the time that the transfer took place; (3) that the place of business of the claimant was near that of the libellant, and that no notice of the demand, except as above stated, was ever given by the libellant to the claimant.

The case turns upon the question of laches. Is the claim, under the circumstances, stale? While a maritime lien confers upon material-men the right to enforce their claims, as against foreign vessels, by proceedings *in rem*, yet the interests of navigation demand that some restrictions should be placed upon such right. Vessels are a species of property, the ownership of which is frequently changed. The lien is a secret one, and purchasers, by the exercise of the greatest diligence, cannot always ascertain the existence of such encumbrances, or guard against loss, if they are suffered to attach for any considerable length of time. Public policy, therefore, requires that when innocent purchasers are to be affected, reasonable diligence should be used in enforcing the lien, or the creditor should be considered as having waived it. Mere lapse of time, it is true, will not render a demand stale, where there are circumstances—as, for instance, the absence of the vessel—which hinder its enforcement. But where the opportunity has occurred, and no proceedings have been taken by the lienor to hold the vessel liable, until after new parties, without notice of the encumbrance, have come into the ownership, it is obviously inequitable and unjust to allow the lien to hold longer than is necessary to afford time for its reasonable enforcement. These are elementary principles, found in all the books and adjudged cases on the subject.

It is difficult to lay down any general rule where the circumstances of each case differ so widely. The safest I have found is the one

adopted by the learned judge in the eastern district of Michigan, in *In re Dubuque*, 2 Abb. (U. S.) 33, where it is said that "a delay to enforce a maritime lien, after a reasonable opportunity to do so, should be deemed a waiver of the lien as against subsequent purchasers or encumbrancers, in good faith and without notice, unless such delay is satisfactorily explained." There is no explanation of the delay in the present case. The alleged liability of the vessel was incurred in August, 1876. Nearly two years elapsed before the libel was filed. In the mean time the vessel was transferred to the claimant, without notice of the lien. She was within reach of the process of the courts, if the libellant had made any effort to hold her. I am clearly of the opinion that he ought not now to be allowed to collect his claim out of the property of an innocent purchaser, and that the libel must be dismissed.

With regard to costs, there must be a decree against the libellant except for what has been incurred by the laches of the proctor of the claimant. More than a year elapsed before a default was entered for want of an answer. A reference was then had, and a final decree taken on the report of the commissioner. On a judgment and execution against the stipulators on their bond nothing was realized here, and the libellant procured a copy of the whole record for the purpose of originating proceedings elsewhere.

At this stage the claimant was allowed to open the decree and put in an answer, but all the costs incurred from the filing the libel until the filing of the answer must be paid by the claimant.

## KEEP v. INDIANAPOLIS &amp; ST. LOUIS R. CO.

## KEEP v. UNION RAILWAY &amp; TRANSIT CO.

*(Circuit Court, E. D. Missouri. October 8, 1881.)***1. COMMON CARRIERS—NEGLIGENCE.**

Where two or more railroads, by an arrangement between themselves, establish a route to a certain point, and contract to carry a passenger over their roads to the terminal point, the terminal road is liable to him, as a common carrier, if, while being conveyed by it to his destination, he is injured, either through the negligence of its immediate employees or others with whom it has contracted for motive power or other service.

**2. SAME—LIABILITY OF PARTY FURNISHING MOTIVE POWER TO A RAILROAD.**

A corporation furnishing motive power to a railroad company, but not acting, or chartered to act, as a common carrier, is not bound to use more than the ordinary skill and diligence which its employment needs, and is only liable for direct negligence or unskilfulness.

**3. SAME—SAME.**

Where a common carrier employs another party to furnish motive power, and through the direct negligence of the latter, a passenger, being conveyed by the carrier, is injured, and the carrier is also at fault, and the passenger brings a suit against each party, and both suits are tried together, the same amount of damages should be rendered against each. Under such circumstances the satisfaction of the judgment in either case should be made to operate as a satisfaction in both.

**4. SAME—SAME—MEASURE OF DAMAGES.**

A party who receives a physical injury through the negligence of another, should be allowed sufficient damages to compensate him for the amount of his expenditures and losses in consequence of the injury, taking also into consideration the extent of his injuries, his sufferings, and the effect of the accident on his general health.

The above-entitled cases were, by order of the court, tried together.

In the case against the Indianapolis & St. Louis Railroad Company the plaintiff alleged in his petition that the defendant was a common carrier of passengers over a railway extending from the city of Indianapolis, in the state of Indiana, to the city of St. Louis, in the state of Missouri; that for a valuable consideration it contracted to convey him as a passenger carefully and safely from Indianapolis to said city of St. Louis; that while he was in a car of the defendant, and was being transported under said contract, the defendant negligently, carelessly, and unskilfully managed and handled said car so that it was violently thrown off the track and overturned, by reason whereof he received serious bodily injuries and suffered greatly, both mentally and physically, and was forced to pay out large sums of money. For all of which he asked damages in the sum of \$50,000.

The defendant put in a general denial.

In the case against the Union Railway & Transit Company, of St. Louis, the plaintiff alleged that the defendant was a common carrier of passengers for hire in cars drawn by steam-power over a certain railway extending from a point in the city of East St. Louis, in the state of Illinois, to a point in the city of St. Louis, in the state of Missouri, over a bridge across the Mississippi river, which railway said defendant controlled and managed; that while the plaintiff was lawfully in a car under the control and management of the defendant, on said railroad in the city of East St. Louis, to be transported as a passenger by defendant to said city of St. Louis, in the state of Missouri, and while it was the defendant's duty to carry him safely over the road to said city of St. Louis, Missouri, said car was, through the carelessness and unskillfulness of the defendant, thrown from the track of said road; and that in consequence the plaintiff was greatly injured, etc. In this case, also, the plaintiff asked for \$50,000 damages.

The defendant denied that it was a common carrier, and also denied all the other material allegations of the petition.

The cases were tried before a jury.

The evidence introduced tended to prove the following facts:

In December, 1878, the plaintiff purchased a through ticket from New York to St. Louis, Missouri, one of the coupons of which called for a passage over the Indianapolis & St. Louis Railroad.

Before reaching East St. Louis the conductor of the train took up the coupon of plaintiff's ticket covering the ride from Indianapolis to St. Louis, Missouri, and gave plaintiff a ticket or check entitling him to ride from East St. Louis over the bridge and through the tunnel to the place of his destination—St. Louis, Missouri. There was a contract between the railroad company and the Union Railway & Transit Company by which the last-named company hauled all the cars of the former between St. Louis and East St. Louis, back and forth, for a specified consideration; the track of the Indianapolis & St. Louis Railroad Company not extending beyond East St. Louis. Trains going westward were delivered to the Union Railway & Transit Company at St. Louis.

The track of the Ohio & Mississippi Railroad Company crosses the tracks of the Union Railway & Transit Company in East St. Louis about 400 feet north of the Relay depot, at right angles. At this crossing a watchman in the employ of the latter company is constantly stationed. The morning of the accident the train of the



Indianapolis & St. Louis, consisting of one baggage car, two passenger coaches, and a sleeping car, pulled across the track of the Ohio & Mississippi about 10 or 15 feet, and then stopped. At the time this was done a gravel train was standing on the track of the Ohio & Mississippi, waiting to come over the crossing. The engine of this gravel train was on the west end of it, and when the passenger train of the Indianapolis & St. Louis had cleared the crossing the watchman stationed there gave the signal to the gravel train to start. Accordingly that train was put in motion and began approaching the crossing, which was about 150 feet from its first gravel car.

As soon as the passenger train stopped, the Indianapolis & St. Louis engine that had been hauling it was cut off and moved away to the round-house; then the engine of the Union Railway & Transit Company backed up from a switch and attempted to couple on to this passenger train. In doing so it pushed the train backward, so that the rear end of the sleeper in which plaintiff was riding was over the crossing down which the gravel train of the Ohio & Mississippi was moving, and a collision ensued, the sleeping car was thrown over and wrecked, and the plaintiff, who was riding in it as a passenger, received the injuries sued for. At the time of the accident the train had not reached the Relay depot in East St. Louis, where its passengers are discharged for that station.

*L. B. Valliant and Joseph Dickson, for plaintiff.*

*John T. Dye, for I. & St. L. R. Co.*

*S. M. Breckenridge, for U. R. & T. Co.*

TREAT, D. J., (*charging jury*.) These two cases have been tried at the same time, yet each is a separate case, to be determined on the law and facts applicable thereto, requiring a distinct verdict. The plaintiff alleges that he received a through ticket from New York to St. Louis, one of the coupons of which called for passage over the Indianapolis & St. Louis Railroad; that said coupon ticket was taken up while he was on said road, by the conductor or some other officer thereof, and in lieu thereof he received a bridge and tunnel ticket to St. Louis; that while in East St. Louis, on the train bound for St. Louis, he was injured through the negligence of the defendant railroad, for which injury he claims damages.

If the said railroad was one of several, whereby a continuous through route from New York to St. Louis was established by an arrangement among themselves, and the defendant railroad was the terminal road at St. Louis, with bridge and terminal arrangements for itself, and if the injury complained of happened at East St.

Louis, through the negligence of the defendant, either acting directly through its immediate employes or acting by other agents with whom it had contracted for intermediate service, then said railroad is liable.

The various matters presented in evidence concerning the relations of the Indianapolis & St. Louis Railroad and the Union Railway & Transit Company call upon the court to determine, as a question of law, whether—*First*, the liability of the Indianapolis & St. Louis Railroad ceased, as a common carrier, at or before the time of the accident; and, *second*, whether the Union Railway & Transit Company had at that time imposed upon it, also, the duties of a common carrier.

The duties of the Indianapolis & St. Louis Railroad Company to the plaintiff as a common carrier, if the facts are as alleged, did not cease until the arrival of the train at St. Louis, although it may have entered into a contract with others to furnish the motive power for hauling the train over the bridge and tunnel. If it was not one of the connecting roads for a through route, its liability ended at the termination of its route.

As to the Union Railway & Transit Company, its liabilities are not those of a common carrier. It had entered into no personal contract with the plaintiff, unless it was one of the common carriers in the through route. But the charter of the latter company does not make it a common carrier as to operations in East St. Louis, nor do any of the contracts produced. Hence, the Union Railway & Transit Company is not liable to the plaintiff for any injury sustained, unless it was guilty of direct negligence or unskillfulness, causing the said injury. If that company did, through such negligence or unskillfulness, cause the injury alleged, it must respond in damages; otherwise, not.

Thus, the jury will decide—*First*, did the plaintiff sustain any injury; and, if so, what is the amount of damages to be awarded him. *Second*, whether the injury was sustained by plaintiff from the negligence of the Indianapolis & St. Louis Railroad, or from the negligence of its agents. *Third*, as the liability of the Union Railway & Transit Company rests upon the degree of negligence of which it was guilty, whether its direct negligence or unskillfulness caused the injury. It was bound, not to the extraordinary diligence required of a common carrier, but to the ordinary diligence and skill which its employment needs.

It must be understood that, so far as the plaintiff is concerned,

his cause of action may be against one or both of the defendants, although he will ultimately be allowed to receive compensation only once.

If the plaintiff is entitled to recover, the amount of damages to be allowed must be sufficient to compensate him for the amount of expenditures and losses by him sustained in consequence of such injury, taking also into consideration the extent of his injuries, the sufferings by him undergone therefrom, and the effect of the accident on his general health.

The jury, through their foreman, informed the court that they had agreed upon damages, and wished "to know whether a judgment against both companies will hold, or can it be assessed against one through the negligence of its agents."

TREAT, D. J. If each company is at fault, the same amount of damages should be rendered against each.

The jury found a verdict for the plaintiff, and awarded him \$7,500 damages against each defendant, and the court ordered that the satisfaction of the judgment in one case should operate as a satisfaction in both.

NOTE. It seems clear that the questions of law arising upon the foregoing facts were, on the whole, correctly put to the jury by the learned and experienced judge who presided at the trial, and with the terseness and brevity which is his habit.

1. In the first place, assuming that the plaintiff was injured through some failure or fault in the means of transportation employed in carrying him from East St. Louis to St. Louis, there is no doubt of the liability of the Indianapolis & St. Louis Railway Company; for his contract was with this company. The recognized American doctrine with reference to the contract for the carriage of passengers which is evidenced by the ordinary railway coupon ticket is, that it is a distinct contract with each carrier who, under it, undertakes the service of carrying the purchaser of the ticket. *Chicago, etc., R. Co. v. Fahey*, 52 Ill. 81; *Kessler v. New York, etc., R. Co.* 61 N. Y. 538; *Milnor v. New York, etc., R. Co.* 53 N. Y. 363; *Knight v. Portland, etc., R. Co.* 56 Me. 234; *Brook v. Grand Trunk R. Co.* 15 Mich. 332. The principle on which the American courts proceed in so holding is, that the company, which sells the coupon ticket over its own and connecting roads, acts as the agent of the connecting companies for the purpose of making the contract of carriage over their roads. In this respect the English courts differ from the American. The former courts hold that such a contract is a contract with the first carrier—the carrier who sells the ticket, only; and that there is no privity between the passenger and

the other carriers. The first carrier undertakes the service for the entire transit, and the others are but the agents of the first, to carry out the undertaking; and hence, for any non-feasance in carrying it out, they are, upon well-settled grounds, liable, not to the passenger, for they are not in any privity of contract with him, but to the first carrier, for whom they have undertaken the service. Hence, in the case of *loss of baggage* of the passenger, under the English rule, the company selling the ticket alone is liable, although the baggage may have been lost on the line of one of the connecting carriers. *Mytton v. Midland R. Co.* 4 Hurl. & N. 615; S. C. 28 L. J. (Exch.) 385. Whereas, under the American rule, either the company selling the ticket, or the carrier losing the baggage would be liable.

But a direct injury to the passenger stands on a different footing from the loss of baggage. Here the passenger has, both under the English and the American doctrine, an action against the carrier on whose line the injury was received. It is a case of the breach of a contract, and also a case of mere tort; for the passenger would have an action although there were no contract, and the undertaking to carry him were gratuitous. *Phila. & Reading R. Co. v. Derby*, 14 How. (U. S.) 463; *Steam-boat New World v. King*, 16 How. (U. S.) 469; *Todd v. Old Colony R. Co.* 3 Allen, 18; S. C. 7 Allen, 207; *Rose v. Des Moines Valley R. Co.* 39 Iowa, 246; *Jacobus v. St. Paul, etc., R. Co.* 20 Minn. 125. The subsequent carrier having invited or permitted the passenger to travel on its train, is bound to make reasonable provision for his safety; and for a failure of this duty, the passenger may maintain an action against it as for pure tort. *Berringer v. Great Eastern R. Co.* 4 C. P. Div. 163; *Foulks v. Metropolitan Dist. R. Co.* Id. 267; *Johnson v. West Chester, etc., R. Co.* 70 Pa. St. 357. It has always been the law that a carrier who has inflicted an injury on a passenger may be sued in tort. *Ansell v. Waterhouse*, 2 Chit. 1; S. C. 6 Maule & Selw. 385; *Bretherton v. Wood*, 6 J. B. Moore. 141; S. C. 3 Brod. & Bing. 54; *Bank of Orange v. Brown*, 9 Wend. 158; *McCall v. Forsyth*, 4 Watts & S. 179; *Pa. R. Co. v. The People*, 31 Ohio St. 537; *Heirm v. McCaughan*, 32 Miss. 17; *Cregin v. Brooklyn, etc., R. Co.* 75 N. Y. 192; *Saltonstall v. Stockton*, Taney's Decis. 11; *Frink v. Potter*, 17 Ill. 506; *New Orleans, etc., R. Co. v. Hurst*, 36 Miss. 660; *Ames v. Union R. Co.* 117 Mass. 541. With the case of *Dale v. Hall*, 1 Wilson, 281, the practice of declaring in *assumpsit* succeeded; but this practice did not supersede the practice of suing in trespass or in case, (*Bayley, J.*, in *Ansell v. Waterhouse*, 2 Chit. 1; S. C. 6 Maule & Selw. 385;) and the passenger has his election to sue for the tort, or to waive the tort and sue for the breach of the contract to carry him safely. *Taney, C. J.*, in *Saltonstall v. Stockton*, Taney's Decis. 11; *Frink v. Potter*, 17 Ill. 406. If he sues in contract, he can only sue the carrier with whom he made the contract; and here is where the difficulty arises in American courts. The courts, English and American, almost universally hold that he may sue the first carrier, who, in cases of a contract like the one in the principal case, is generally deemed to undertake for the safe carriage of the passenger and his baggage over the entire route embracing the connecting lines. *Great Western R. Co. v. Blake*, 7 Hurl. & N. 987; S. C. Thomp. Carriers of Passengers, 403; *Buxton v. North Eastern R. Co.* L. R. 3 Q. B. 549; *Kent v. Midland R. Co.* L. R. 10 Q. B. 1; S. C. 44 L. J. (Q. B.) 18; *Mytton v. Mid-*

*Ind R. Co.* 4 Hurl. & N. 614; S. C. 28 L. J. (Exch.) 885; *Najac v. Boston, etc., R. Co.* 7 Allen, 329; *Illinois, etc., R. Co. v. Copeland*, 24 Ill. 337; *Wilson v. Chesapeake R. Co.* 21 Gratt. 654; *Williams v. Vanderbilt*, 28 N. Y. 217; S. C. 29 Barb. 401; *Hart v. Rensselaer, etc., R. Co.* 8 N. Y. 37; *Burnell v. New York, etc., R. Co.* 45 N. Y. 184; *Weed v. Saratoga, etc., R. Co.* 19 Wend. 534; *Candee v. Pa. R. Co.* 21 Wis. 582; S. C. Thomp. Carriers of Pass. 419; *Carter v. Peek*, 4 Sneed, 203. It has been supposed, however, that extrinsic evidence is admissible to show the real nature of the contract, whether the first carrier did, in fact, assume to carry the passenger for the entire distance called for by the ticket or tickets. This proceeds upon the idea that the ticket is not a contract, but a mere token, and that its meaning may well be explained by parol. *Quimby v. Vanderbilt*, 17 N. Y. 306. A similar view obtains in *Tennessee, Nashville, etc., R. Co. v. Sprayberry*, 9 Heisk. 852; S. C. 1 Cent. Law J. 541. But this view is questionable. It is no doubt true as a fact that nearly all the American railways have running connections with each other, so that one railway company will issue tickets at any principal city, which will be good over any intermediate connecting road which it may name to any other city in the country. It should seem that the law ought to affix a definite meaning to a practice which has become so general and so uniform, and not leave the rights of the traveling public to the sport of parol testimony.

But it may be inconvenient for the passenger who has sustained damage through the failure of the last connecting carrier to perform its part of the understanding, to go back to the place of starting and sue the first carrier for a breach of the contract to carry. Some courts have, therefore, adopted the view that in a contract such as that in the principal case, the carrier selling the tickets is but the agent of the other connecting carriers to sell the tickets for them, and account to them for the proceeds. *Knight v. Portland, etc., R. Co.* 56 Me. 235; *Furstenhiem v. Memphis, etc., R. Co.* 9 Heisk. 852; S. C. 1 Cent. Law J. 541; *Hood v. New York, etc., R. Co.* 22 Conn. 1. But this conflict of view is of little importance, where the passenger's cause of action is a personal injury. In such cases, he now sues in tort, especially as he may be able to get exemplary damages in this form of action, which he could not have, if suing in contract. It is only in case of the carriage of goods, or in case of the loss of a passenger's baggage, that the question becomes important. In the former case, as pointed out by a recent able writer, the American courts generally limit the liability of the carrier, in the absence of special contract, to its own line. Lawson, Carriers, § 240. In the latter case, the rule is that the loss falls on the particular carrier in whose hands the baggage was lost; that is to say, whatever may be the liability of the carrier selling the ticket, each of the connecting carriers, whose conductor or other proper agent recognizes the ticket and undertakes to carry the passenger in pursuance of it, becomes responsible for the safe carriage of his baggage in case it comes into his hands. *Chicago, etc., R. Co. v. Fahey*, 52 Ill. 81. But the connecting carrier would not be responsible without proof that the baggage did come into his possession. *Kessler v. New York, etc., R. Co.* 61 N. Y. 538. See *Milnor v. New York, etc., R. Co.* 53 N. Y. 363.

2. The fact that the injury to the plaintiff might have been the result of

the negligence of the Union Railway & Transit Company, clearly would not alter the liability of the Indianapolis & St. Louis Railroad Company; for the latter had constituted the former their agent to complete the transit. In such cases, the general rule is that the carrier who uses the line and means of transportation of another company is responsible for the negligence of such other company. "Railway companies," said Lord Cockburn, "ought, at least, to use due care to keep the line over which they contract to carry passengers, in a safe condition. There is no doubt that this is the obligation which attaches to a railway company which undertakes to convey passengers through the whole distance of their line; and if, by arrangement with another company, they convey passengers over the whole or part of another line, the same obligation attaches, and they make the other company their agent, and on their part, they undertake that the other company shall have their line in proper condition." *Great Western R. Co. v. Blake*, 7 Hurl. & N. 992; S. C. Thomp. Carriers of Pass. 403. "A company," said *Lush, J.*, in another case, "undertaking to carry passengers over another line, is answerable for negligence happening on it, just as much as if it happened on their own line." *Buxton v. North Eastern R. Co.* L. R. 3 Q. B. 549, 554. So, in the supreme court of New Hampshire, it has been said: "By using the railroad of another corporation as a part of their track, whether by contract or mere permission, they would ordinarily, for many purposes, make it their own, and would assume towards those whom they had agreed to receive as passengers all the duties resulting from that as to the road; and, if accident resulted to such passengers from any failure of duty of the owners of the road, for which they would be responsible if the road was their own, their remedy over would be against the owners." *Murch v. Concord R. Co.* 29 N. H. 35. To the same effect are *Seymour v. Chicago, etc., R. Co.* 3 Biss. 43; *John v. Bacon*, L. R. 5 C. P. 437; *Peters v. Rylands*, 20 Pa. St. 497; S. C. 1 Philadelphia, 264; *McLean v. Burbank*, 11 Minn. 277. So far as we know, the only contrary American decision is one in which the opinion was delivered by Judge Redfield, decided in 1857. *Sprague v. Smith*, 29 Vt. 421. Notwithstanding the eminent character of the judge who wrote the opinion, it is obviously unsound, and opposed to the entire weight of authority, English and American.

3. A more interesting question relates to the right of action which the plaintiff had against the Union Railway & Transit Company. Aside from any questions of imputed negligence,—that is, contributory negligence of the passenger's own carrier,—under what circumstances, if any, has he a right of action against a carrier with whom he is in no privity of contract, and who acts simply as the agent of the carrier which has undertaken to carry him? This question has been mooted in several cases where it was unnecessary to decide it, because the passenger had brought the action against his own carrier. *Martin, B.*, in *Birkett v. Whitehaven Junction R. Co.* 4 Hurl. & N. 730, 737; *Crompton, J.*, in *Great Western R. Co. v. Blake*, 7 Hurl. & N. 987, 994; *Bramwell, B.*, in *Wright v. Midland R. Co.*, L. R. 8 Exch. 137, 143; *Bell, J.*, in *Murch v. Concord R. Co.* 29 N. H. 9, 35. The answer is simple. He has the same right of action that a passenger would have for a personal injury against a stage-driver who was not the proprietor of the means of transportation. For an act of non-feasance on the part of one who is the agent or

servant of another,—that is, a mere failure to perform the duties of his agency or service,—a stranger has no action against the agent or servant, because the latter has failed in duty only to his principal or master. *Hill v. Caverly*, 7 N. H. 215. But if the servant or agent, whether executing the orders of his master or principal or not, does a positive act of misfeasance or trespass, whereby another person is injured, he is liable to an action therefor by the person injured. *Harriman v. Stowe*, 59 Mo. 93; S. C. 2 Thomp. Neg. 1057; *Moore v. Suydam*, 8 Barb. 358; *Wright v. Compton*, 53 Ind. 337. In some cases the principal and agent may be jointly sued; because if one commands a trespass and another executes it, both are principals, (*Hewett v. Swift*, 3 Allen, 420; S. C. 10 Am. Law Reg. 505; *Whitmore v. Waterhouse*, 4 Car. & P. 383, per *Parke*, J.) and there seems no difficulty about this under the codes. *Montfort v. Hughes*, 3 E. D. Smith, 591; *Phelps v. Waite*, 30 N. Y. 78; *Suydam v. Moore*, 8 Barb. 358; *Wright v. Compton*, 53 Ind. 337. See also *New Orleans, etc., R. Co. v. Bailey*, 40 Miss. 395; *Fletcher v. Boston, etc., R. Co.* 1 Allen, 9; *Illinois, etc., R. Co. v. Kanouse*, 39 Ill. 272.

Whether the learned judge in the principal case was right in directing the jury that the Union Railway & Transit Company was not a common carrier need not be discussed; because it is conceived that its liability would be the same for an injury to a person while hauling him over its road, whether it be called a common carrier or not. Any debate about degrees of negligence in such a case would be misleading; for “when carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible degree of diligence. \* \* \* Any negligence in such cases may well deserve the epithet of gross.” *Phila. & Reading R. Co. v. Derby*, 15 How. (U. S.) 486; *Steam-boat New World v. King*, 16 How. (U. S.) 469. The Union Railway & Transit Company may not be technically a common carrier; but in the prosecution of its business it has the custody of human beings, and the care of their lives, exactly as it would have if it were a railway common carrier, and unquestionably it is subject to the same obligation of care in the prosecution of its business. In *Schopman v. Boston, etc., R. Co.* 9 Cush. 24, it was ruled that a railroad company which receives on its track the cars of another company, placing them under the control of its own agents and servants, and drawing them by its own locomotives, over its own road, to their place of destination, assumes towards the passengers coming upon its road in such cars the relation of a common carrier of passengers, and all the liabilities incident to that relation.

St. Louis.

SEYMOUR D. THOMPSON.

## PRATT v. ALBRIGHT, Defendant, and another, Garnishee.

(Circuit Court, E. D. Wisconsin. October Term, 1881.)

## 1. REMOVAL OF CAUSES—GARNISHMENT UNDER THE STATUTE OF WISCONSIN.

Proceedings in garnishment, instituted under the statute of Wisconsin, are auxiliary to the main action, when considered with reference to the right of removal to the federal court.

## 2. CASE STATED.

In a court of the state of Wisconsin, garnishee proceedings were instituted concurrently with the commencement of an action. The garnishee answered denying all indebtedness or liability to the principal defendant. The main action proceeded to judgment; and thereafter, and while the garnishee proceedings were still pending, the plaintiff, who was a citizen of a different state from that either of the defendant or garnishee, had the cause removed to a federal court. On motion to remand the cause to the state court, *held*, that the removal, having been made after a judgment had been rendered in the main action, was too late, and the cause must be remanded.

Garnishee Proceedings. Motion to remand.

*Goodwin & Benedict*, for motion to remand.

*Hastings & Greene*, *contra*.

DYER, D. J. A statute of the state of Wisconsin provides that either at the time of the issuing of a summons, or at any time thereafter before final judgment, in any action to recover damages founded upon contract, express or implied, or at any time after the issuing in any case of an execution against property and before the time when it is returnable, proceedings of garnishment may be had by the plaintiff in the action against any person indebted to the defendant, and a course of procedure is prescribed by which the garnishee may be required to answer as to any such indebtedness, and may be made amenable to the orders of the court wherein the principal action is pending.

It is further provided that when the garnishment is not in aid of an execution, no trial shall be had of the garnishee action until the plaintiff shall have judgment in the principal action, and the proceeding is to be deemed an action by the plaintiff against the defendant in the principal suit and the garnishee, as parties defendant. The statute also authorizes the defendant in the principal action to defend the proceeding against the garnishee, and the garnishee, at his option, to defend the principal action for the defendant if the latter does not defend. With these statutory provisions in force, the plaintiff herein commenced a suit in the state court against the defendant Albright to recover the amount due upon an accepted bill of exchange, and, concurrently with the commencement of that action, instituted



garnishee proceedings against D. W. King, named also as defendant, as the action is entitled in this court. The foundation of these proceedings was such an affidavit as the statute requires, and the garnishee was summoned to appear and answer whether he was indebted to the principal defendant. Both the affidavit and the summons were entitled, "*Joseph Pratt, plaintiff, v. S. C. Albright, defendant; D. W. King, garnishee.*" The garnishee, by answer in due form, denied all indebtedness or liability to the principal defendant, and an issue upon that question was thus formed. Afterwards, and while the garnishee proceeding was pending, judgment was obtained by the plaintiff upon his demand in the principal action against the defendant. Thereupon, the plaintiff, a citizen of Illinois, filed a petition in the state court for removal of the case to this court; King as garnishee and Albright as the principal debtor being named in the petition as citizens of Wisconsin, and as defendants in the action or proceeding sought to be removed. Upon the execution of the requisite bond the state court ordered the case removed to this court. The removal was made under the act of March 3, 1875, and the evident purpose of the plaintiff was to bring the garnishee proceedings into the federal court for final disposition. A motion is now made to remand, and the determination of the motion involves the question whether the action against the garnishee is a suit that may be thus removed within the contemplation of the removal act.

The language of the second section of that act is "that any suit of a civil nature, at law or in equity, now pending, etc., \* \* \* in which there shall be a controversy between citizens of different states, may be removed." It is, of course, obvious that the principal suit, wherein the plaintiff and Albright were the sole parties, could not be removed when the present removal proceedings were instituted, because final judgment in that action had been previously entered. What was the garnishee proceeding? In the light in which it must now be considered, was it anything more than a graft upon the principal action—a mere auxiliary or incident to the main proceeding? It seems to me it was not, and that, under the authorities most directly applicable, it must be so regarded. It was in the nature of a supplementary or auxiliary proceeding in aid of a suit for the recovery of a debt, which suit could not be removed because it was determined before any removal to the federal court was attempted. It is true that under the state statute the garnishee is required by summons to answer the plaintiff's affidavit upon which the proceed-

ings are founded, and it is also true that the statute declares, with the evident view of maintaining an orderly course of procedure, and of suitably protecting the rights of the parties, that the proceeding against a garnishee shall be deemed an action. But it is, after all, essentially but a branch of the main suit, and since that suit was not removable at the stage when a removal was attempted, I am of the opinion that the garnishee proceedings could not be transferred to this court. This conclusion is supported by authorities which are entitled to weight as bearing upon the question.

In *Weeks v. Billings*, 55 N. H. 371, the question arose whether a defendant under trustee process,—which in its purpose and general character, as existing in New Hampshire, is analogous to garnishee process or procedure in this state—could remove the proceeding to the federal court, there to be tried as a suit against him; and it was held that he could not. In the opinion of the court it is, among other things, said that—

“Although the trustee may in some sense be regarded as a defendant, and the question of his liability be tried by a jury or by the court, he has, nevertheless, never been regarded by the courts as a defendant, in the proper and usual sense of the term, and, in common parlance, is known and called by the name of trustee, while his alleged creditor is called the principal defendant. They are not sued in the same right, and are not answerable to the plaintiff in the same manner. The principal is sued on account of some alleged injury which the plaintiff has sustained by his act or neglect. But, as between the plaintiff and trustee, there is no privity of contract, or other act or neglect by which the plaintiff has sustained damage. The property and credits of the principal defendant in his hands are attached, and he is summoned to show cause why execution should not issue against him for the damage which the plaintiff may recover against the principal defendant. The process as to him is rather to be regarded as an attachment of the defendant's property in his hands; and even if this were an action in which the state and federal courts had original concurrent jurisdiction of the funds of the defendant in the hands of the trustee, the state court, being the one before whom proceedings were first had, and whose jurisdiction first attached, would retain its jurisdiction to the exclusion of the other court, if the only controversy were as to the disposition of the funds so attached.”

The removal in the case cited was attempted to be made under the second clause of section 639 of the Revised Statutes, but the discussion of the question by the court, from whose opinion the foregoing extract is made, applies with force to the question as it arises in the case at bar, since, under all the statutes authorizing removals of causes to the federal court, the proceeding removed must be a suit in the sense of those statutes; and it was not contended on the argu-

ment that the act of 1875 is in that regard different from the judiciary act of 1789, or the removal acts of 1866 and 1867.

In Iowa an "occupying claimant" of land, who is an unsuccessful defendant in an ejectment suit, has the right to retain possession, after judgment against him, until the value of his improvements are ascertained, provided he files his petition therefor in the main action after judgment, but before the plaintiff causes it to be executed. In *Chapman v. Barger*, 4 Dill. 557, it was held that this proceeding by petition, for ascertainment of the value of improvements upon land, was not removable to the federal court under the act of March 3, 1875; and for the reason that it was essentially part of and ancillary to the main suit, which was at an end, judgment having been rendered therein in the state court. So, with equal force, I think it may be said of the case at bar, that the garnishee proceeding is a dependence of and ancillary to the principal suit, which has been brought to an end by judgment in the state court.

In *Webber v. Humphries*, 8 Rep. 66, an execution upon a judgment in a state court against a corporation was returned *nulla bona*, and a motion was then made under the statutes of Wisconsin for an execution against one of the stockholders. The stockholder then took the necessary steps to remove the case into the federal court, and a motion to remand was sustained on the ground that the proceeding sought to be removed was a mere sequence or dependency, or proceeding supplemental to the main action.

In *Bank v. Turnbull & Co.* 16 Wall. 190, after judgment recovered in a state court, an execution was issued and levied upon property in the possession of the judgment debtor, but the ownership of which was claimed by third parties. The claimants, Turnbull & Co., thereupon applied to the court under the statutes of the state for leave to intervene in the original suit, and to order an issue to try the right of property. Leave was granted, and an order was made for trial by jury of the question whether the judgment debtor or Turnbull & Co. owned the property. Thereupon, the claimants of the property removed the case to the federal court, and the question decided by the supreme court was whether the case was thus removable. Mr. Justice Swayne, speaking for the court, said:

"Conceding it [meaning the proceeding instituted to try the right of property] to be a suit, and not essentially a motion, we think it was merely auxiliary to the original action, a graft upon it, and not an independent and separate litigation. A judgment had been recovered in the original suit, final process was levied upon the property in question to satisfy it, the property

was claimed by Turnbull & Co., and this proceeding, authorized by the laws of Virginia, was resorted to to settle the question whether the property ought to be so applied. The contest could not have arisen but for the judgment and execution, and the satisfaction of the former would at once have extinguished the controversy between the parties. The proceeding was necessarily instituted in the court where the judgment was rendered, and whence the execution issued. No other court, according to the statute, could have taken jurisdiction. It was provided to enable the court to determine whether its process had, as was claimed, been misapplied, and what right and justice required should be done touching the property in the hands of its officer. It was intended to enable the court, the plaintiff in the original action, and the claimant, to reach the final and proper result by a process at once speedy, informal, and inexpensive. That it was only auxiliary and incidental to the original suit, is, we think, too clear to require discussion."

In accordance with these views the court below was directed to remit the case to the state court, and nothing need be added to the foregoing extract from the opinion of the court in the case cited, to emphasize the analogy upon principle between that case and the case at bar.

In *Barrow v. Hunton*, 99 U. S. 80, an action of nullity was instituted in a state court to set aside a judgment that had been recovered in the same court wherein that action was brought. The case was removed to the federal court, and the question decided by the supreme court was whether the proceeding to procure nullity of the judgment was to such an extent an independent, separate suit as to make it removable. It was held that it was rather in the nature of a supplementary proceeding, so connected with the original suit as to form an incident to it and substantially a continuation of it, and was not transferable to the federal court as a suit of which that court could take cognizance.

The statute of Wisconsin relating to garnishment, as we have seen, provides for garnishee proceedings as well after the issuing of an execution as before judgment, and if in this case execution had been issued, and the proceeding against the garnishee had taken place after that event, I think it would hardly be contended, in the light of the authorities, that such a proceeding could be removed to the federal court any more than a proceeding purely supplementary to execution could be so removed. And when we consider the essential character of a garnishee proceeding, I do not think the fact that the action against the garnishee was instituted while the principal suit was pending, and before judgment and execution, lends any additional force to the argument in favor of removal.

The attention of the court has been called to the case of *Tunstall v. Worthington*, Hempst. 662, wherein it was held that proceedings against a garnishee, after execution, was so far a civil suit that the federal court had not jurisdiction thereof, if the parties thereto were citizens of the same state, although the judgment upon which the execution was issued was recovered in that court. The soundness of this decision may well be doubted, in the light of later authorities; for it is fully settled that even a creditors' bill, to enforce payment of a judgment recovered in the federal court, is but a continuation of the original suit at law, and may be prosecuted in that court without regard to the citizenship of the parties.

*Keith v. Levi*, 1 McCrary, 343, [S. C. 2 FED. REP. 743,] was cited on the argument as an authority to the effect that a controversy between citizens of different states, as to the validity of an attachment, constituted a removable case within the meaning of section 639 of the Revised Statutes. But the question of the validity of the attachment in that case arose upon a plea in abatement to the petition in the principal suit, which alleged that the defendant was about to fraudulently dispose of his property, and hence was one of the issues in the main case. The authority is therefore not applicable. Nor do I think that *Watson v. Bondurant*, 2 Woods, 166, which was also cited, has any application to the question here presented for adjudication.

On the whole, my opinion is that the proceeding against the garnishee, which it is sought to bring within the jurisdiction of this court by removal after judgment in the original action, is, in the language of the court in *Bank v. Turnbull*, *supra*, merely auxiliary to that action, a graft upon it, and not such an independent, separate suit as may be removed to this court under the removal act of 1875.

Motion to remand granted.

## CASS v. MANCHESTER IRON &amp; STEEL Co. and others.

(Circuit Court, W. D. Pennsylvania. December 27, 1881.)

## 1. CORPORATIONS—POWERS.

The charter of a corporation is the measure of its powers, and the enumeration of these powers implies the exclusion of all others.

## 2. SAME—PARTICULAR CHARTER CONSTRUED.

The Manchester Iron & Steel Company, a private corporation incorporated by an act of the legislature of Pennsylvania, has no power under its charter to lease its plant.

## 3. SAME—POWER OF THE BOARD OF DIRECTORS.

Even if such power exists in the corporation, the board of directors cannot exercise it against the protest of the owner of a majority of the stock.

In Equity. Motion for preliminary injunction.

*George Gray* and *Knox & Reed*, for complainant.

*Hampton & Dalzell*, for respondents.

MCKENNAN, C. J. The Manchester Iron & Steel Company is a private corporation, authorized by an act of the legislature of Pennsylvania, passed April 29, 1874. By the certificate of its incorporation it is placed in the class of corporations for profit, and under the seventeenth division of that class, as a corporation for "the manufacture of iron or steel, or both, or any other metal, or of any article of commerce from metal or wood, or both." Its powers, therefore, are derived from and are defined by the thirty-eighth section of the act, which relates specially to corporations of that description. The first clause of that section, which is the only portion of it that is material, provides that—

"Every such corporation may, in the manner prescribed in this act, increase its capital stock to an amount not exceeding \$5,000,000, and shall have the right to purchase, lease, hold, mortgage, and sell real estate and mining rights, to prove and open mines, to mine and prepare for market, or for their own use and consumption, coal, iron ore, and other minerals, and to erect and construct furnaces, forges, mills, foundries, manufactories, and such other improvements and erections as they may deem necessary, and to manufacture iron and steel, or any other metal, or either thereof, in all shapes and forms, and either of these metals, exclusively or in combination with other metals, or with wood, and to transport all of said articles or any of them to market, and to dispose of the same, and do all such other acts and things as a successful and convenient prosecution of said business may require, provided they shall not, at any time, have more than 10,000 acres of land within this commonwealth, including leased lands."

The organization of the company defendant embraces a president and four directors, of whom the complainant is one, and represents,

in his own right, a majority of the stock issued by the corporation. In that character he files his bill, alleging that the annual election of directors by the stockholders is to occur on the nineteenth of January, 1882, and that a majority of the board of directors have determined and propose, against his protest, before the annual election, to lease the whole plant of the corporation for a term of not less than five years, with an option in the lessee to purchase the premises at a price to be fixed in the contract. He therefore asks the intervention of this court to restrain the proposed action of the directors.

The respondents admit that they propose to lease the property of the corporation to a responsible tenant for a term of not less than five years and not exceeding ten, at an annual rental of not less than \$20,000, with additional incidental payments to be made by the lessee, and they allege that the completion of this arrangement requires prompt action on their part, and that it was, in the highest degree, conducive to the interests of the stockholders.

In the view we take of the case, it is unnecessary to consider whether the contemplated lease is expedient or not. Under ordinary circumstances that consideration is addressed solely to the discretion and judgment of the governing power of the corporation, and a court of equity would not, therefore, assume to control it.

The primary question is, has the corporation the power, under its charter, to make the proposed lease, and if so, ought it to be exercised by the directors without reference to or against the judgment of the stockholders? A charter ought to be liberally construed to effectuate the object of the creation of the body corporate, but it cannot be regarded as possessing any power which is not conferred upon it by express grant or clear implication. The rule as stated by Mr. Justice Miller in *Thomas v. Railroad Co.* 101 U. S. 82, is—

“That the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others.”

The corporation in this case is a manufacturing association, resulting from its statutory classification and its description in letters patent. The fundamental object of the association, as declared by law, is the manufacturing of iron and steel, or other metals, either separately, or in combination with each other, or with wood, and it

is obvious that the powers conferred upon it are incidental and auxiliary to the main purpose of its creation, and are to be exercised through its corporate organization. In the thirty-eighth section of the statute (quoted above) the powers of the corporation are enumerated specifically, but the power to lease is not found in this enumeration. In the language of Judge Miller, this omission "implies the exclusion" of such power. The power to lease is given, but it is to acquire property in that mode. Even if it can be construed otherwise, or can be implied from, or is embraced in, the express power to sell, as was argued, it is limited in its exercise to real estate and mining rights, and does not comprehend the entire plant of the corporation.

We are of opinion, then, that the charter contemplates and authorizes the prosecution of the business described in it, by the corporation itself, by the direct agency and under the supervision, management, and administration of the corporate officers whom the stockholders may select for that purpose; and that a contract which involves a relinquishment of this faculty, or a transfer of it to others, is beyond the scope of the power of the corporation.

But if this conclusion is the result of too strict a construction of the charter, we are of opinion that the power in question is not exercisable independently of the judgment of the stockholders. The directors and officers of a corporation are its exclusive executive agents, and, as it can only act by and through them, the powers vested in the corporation are deemed to be conferred upon its representatives; but they are, nevertheless, trustees for the stockholders. The law recognizes the stockholders as the ultimately controlling power in the corporation, because they may, at each authorized election, entirely change its organization, and may, at any time, keep their trustees within the line of faithful administration by an appeal to a court of equity. Hence, it has been held that the directors of a corporation cannot alone increase its capital stock, where such increase was authorized by its charter, "at the pleasure of said corporation," and where it was provided "that all the powers of said corporation shall be vested in and exercised by a board of directors," etc.; and this for the reason that "the general power to perform all corporate acts refers to the ordinary business transactions of the corporation," and not to a change so fundamental and organic. 18 Wall. 234.

The change proposed here is not organic, it is true, but it is thorough and fundamental, as it affects the administration of the company's



affairs. It involves a withdrawal from the control and management of the stockholders of the entire property of the corporation for a period of at least five years; it will preclude for a like period the exercise annually by the stockholders of their judgment as to the particular character and method of conducting the business affairs of the corporation; and it denies to the stockholders any right of suggestion or disapproval of the conditions upon which a relinquishment of important corporate faculties may be conceded. Surely a power which will be attended with such consequences does not relate "to the ordinary business transactions," nor "to the orderly and proper administration of the affairs," of the company, and hence cannot be exercised by the directors without express authority to them.

But the fact is conceded that the complainant represents a majority of the stock issued by the corporation, and he has made known to us in his bill that the proposed lease is repugnant to his judgment. We are therefore called upon to decide, not merely that it may be made by the directors without consulting their constituents, but against the protest of a majority of them. This we cannot do, but order that a preliminary injunction be issued as prayed for.

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*In re SWENK, Bankrupt.*

(Circuit Court, W. D. Pennsylvania. November 16, 1881.)

1. **EQUITABLE RELIEF—JUDGMENTS—APPEALS—FRAUD.**

In January, 1876, Thomas Swenk gave to one Dougal a warrant to confess judgment against him, and on the thirteenth of March, 1877, a like warrant was given to one Baker, and in pursuance of these warrants judgments were confessed and entered in April, 1877. Proceedings in bankruptcy were commenced on the seventeenth of May, 1877. By order of the district court the real estate of the bankrupt was sold discharged of liens, the proceeds of sale being substituted for the land as security for the liens upon it. The appellees applied to the court for, and obtained, an order directing the payment of their judgments out of the funds produced by the sale. The assignee opposed this application upon the ground that the judgments were fraudulent preferences under the bankrupt act. *Held*, that an appeal will not lie to such order. The judgments being apparently valid, the only mode of contesting and avoiding them is by complaint in equity, and a decree which might be the subject of appeal to either the circuit or supreme court; that where the warrants upon which the judgments were confessed were executed and delivered more than two months before the petition in bankruptcy was filed, it was beyond the power of the court to avoid the judgments on the ground of constructive fraud.

Appeals by W. A. Heinen, assignee, from the orders of the district court directing the payment of judgments of Baker and Dougal, out of

the proceeds of the sale of the real estate of the bankrupt, upon which they were liens.

*John McCleery and Samuel Linn*, for appellant.

*Joshua Cromley and J. O. Parsons*, for appellees.

McKENNAN, C. J. It is urged by the counsel of the appellees that this court ought not to take cognizance of these cases, because the order of the district court is not subject to appeal, and I cannot say that the objection is without force.

By the order of the bankruptcy court the real estate of the bankrupt was sold discharged of liens, and, of course, the proceeds of the sale were substituted for the land, as security for the liens upon it. The appellees held judgments against the bankrupt which were apparently liens upon the real estate sold, and therefore applied to the court for an order directing the payment of their judgments out of the fund produced by the sale. The assignee opposed this application upon the ground that the judgments of the appellees were fraudulent preferences under the bankrupt act, but notwithstanding his objection the court made the orders prayed for; and it is from these orders that these appeals have been taken.

Although the subject-matter of the objection is within the jurisdiction of the court, yet the method of asserting it was inappropriate and unwarranted. It had nothing of the formal character of a suit in equity, by which alone the objection could be effectively urged. The judgments were apparently valid, and the only mode of contesting this and of avoiding them is by a complaint in equity and a decree, which might be the subject of appeal to either the circuit or the supreme court. From the result of any other form of proceeding or adjudication no appeal is provided by any clause of the bankrupt act. I might, therefore, decline to consider the merits of the contest, which have been very fully discussed by counsel. But I think the orders of the district court were properly made, even considering the grounds of objection set up by the assignee. In January, 1876, the bankrupt gave to Dougal a warrant to confess judgment against him, and on the thirteenth of March, 1877, a like warrant was given to Baker; and, in pursuance of these warrants, judgments were confessed and entered in April, 1877. The proceeding in bankruptcy was commenced on the seventeenth of May, 1877. Although, then, the judgments were entered within two months before the commencement of proceedings in bankruptcy, yet it has been held, and is now the well-settled law, that the warrants upon which the judgments were confessed must be given within the two months fixed by the bankrupt

law to render such judgments questionable as fraudulent preferences. In both cases here the warrants were executed and delivered more than two months before the petition in bankruptcy was filed, and hence it was beyond the power of the court to avoid the judgments on the ground of constructive fraud. The court below, therefore, properly recognized the validity of the judgments of the appellees, and made the orders prayed for.

Appeals dismissed at costs of appellant.

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KIRK v. LEWIS and others.\*

(Circuit Court, E. D. Louisiana. December, 1881.)

1. CONFISCATION ACT OF AUGUST 6, 1861.

A sale under the confiscation act of congress, approved August 6, 1861, (12 St. 319,) conveys to the purchaser the fee of the property, and not the life-estate only of the owner thereof.

2. PARDON.

It seems, that a pardon does not remit forfeitures where the rights of third persons have intervened.

*Armstrong's Foundry*, 6 Wall. 766, distinguished.

Plaintiff, on behalf of herself and her minor children, alleged that her late husband, R. W. Pasteur, and his brother, C. N. Pasteur, were, during their lives, the owners of certain real estate in New Orleans, known as the Virginia Press; that under proceedings taken in virtue of the act of congress, approved August 6, 1861, entitled "An act to confiscate the property used for insurrectionary purposes," on November 17, 1863, said property was seized by the United States marshal, and subsequently condemned and sold. The bill then avers that by such procedure the estate of said R. W. and C. N. Pasteur was forfeited for and during the term of their natural lives. Complainant then sets forth the death of her husband and his brother; her appointment as tutrix of their minor children; the possession of defendants of the property in question; and prays that the undivided half thereof formerly belonging to her husband be delivered up to her, and that there be an accounting for the fruits and revenues that have accumulated since the death of her husband. The defendants demurred on two grounds: (1) That proper parties had not been made; and (2) that the marshal's sale of the property, alleged in the libel, was a full and complete divestiture of title from R. W. Pasteur and his heirs, and not merely of his life-estate, as claimed by complainants.

*W. R. Mills* and *R. Stuart Dennee*, for complainants.

*John A. Campbell* and *Thos. L. Bayne*, for defendants.

BILLINGS, D. J. There have been several grounds urged in support of the demurrer. I shall consider but one: Did the respondents

\*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

purchase the fee of the property or only a life-estate? The bill and record of this confiscation proceeding, which are made part thereof, show a sale by the United States marshal, and a purchase by the defendants, of the property here demanded, under the act of August, 1861. That act provided for the seizure and confiscation of property used, or intended to be used, to aid in a rebellion, then a war. It made no discrimination between the property of citizens and that of aliens. It excited no scruples as to its constitutionality in the mind of the president. It was qualified and restricted by no joint resolution; in fact, it added nothing to the undoubted right of war which the government before that possessed to seize and dispose of all property used in aid of its enemies. The sole effect was to declare the purpose of congress to enforce a belligerent right. The supreme court says this emphatically in *Miller v. U. S.* 11 Wall. 308, and they reaffirm the same doctrine in *Osborn v. U. S.* 91 U. S. 477. All the cases in which the supreme court have limited the estate which passed at a confiscation sale to a life-estate have been prosecuted under the act of July 17, 1862. In all these cases the restriction has been put on the estate in consequence of the joint resolution. See *Bigelow v. Forrest*, 9 Wall. 341, and *Day v. Micou*, 18 Wall. 156. But the joint resolution was in its terms confined to the act of 1862. The effect of this confiscation, which in its terms included the fee, is to be determined by the character of the act of 1861. This the supreme court say was an exercise of the war power, and not of municipal sovereignty. This is consistent with the rulings of the supreme court in the *Armstrong's Foundry*, 6 Wall. 769. That case holds that a pardon, properly pleaded, ended proceedings under the act of 1861. That case does not decide the question presented here. The power given by the constitution to the president to pardon is without qualification, and a complete pardon remits all forfeitures except where the rights of third persons have intervened. This is equally true where the forfeiture arises under a merely municipal law or the law of nations, and does not conflict with the doctrine, as above established, that a forfeiture arising *jure belli* is to be measured by the grant of power to congress to declare war and make peace; or with the other doctrine, that the act of congress under which this forfeiture was made was the exercise of a belligerent right on the part of the government of the United States.

Let the demurrer be sustained.

## DAVIS and others v. BROWN and others.

(Circuit Court, S. D. New York. May 25, 1881.)

## 1. REISSUE No. 8,589—GRAIN DRILLS—VALIDITY—INFRINGEMENT.

Reissued letters patent No. 8,589, granted February 18, 1879, to Charles F. Davis, for improvement in grain drills, *held valid and infringed*. Complainant's invention being a grain drill, constructed to shift or change the seeding shoes from a straight to a zigzag line, or *vice versa*, and to admit of their being raised separately or all together, and consisting in connecting the shoes by means of drag-bars and yokes to a crank-shaft mounted on the forepart of the main frame, and by means of levers, one for each shoe, in such a manner to a rear shaft, actuated by a lever within reach of the operator, as to permit of all the shoes being raised simultaneously, such shoe levers having also independent levers or handles, so that each may move irrespective of any other, the lower end of the operator's lever having connected to it a rack-bar, taking into a pinion fastened on the end of the crank-shaft, and, when actuated, shifting the shoes into a straight or zigzag line, *held infringed* by defendant's device, in which every alternate shoe is connected to an immovable part of the frame, and every other alternate shoe is connected to a swinging cross-bar, actuated by a lever at the rear of the machine, to shift the shoes attached to such movable frame or cross-bar, and in which springs are arranged to hold the movable shoes normally in a straight line, and urge them into a straight line, when the power exerted upon the operator's lever in shifting is released.

W. F. Cogswell and S. D. Bentley, for plaintiffs.

B. F. Thurston and Wood & Boyd, for defendants.

BLATCHFORD, C. J. This suit is brought on re-issued letters patent No. 8,589, granted to Charles F. Davis and William Allen, February 18, 1879, for an "improvement in grain drills," the original patent having been granted to said Davis, as inventor, February 18, 1868. The following is the specification of the re-issue, reading what is inside of brackets and what is outside of brackets, omitting what is in italics:

"Figure 1 represents a top plan [or top view] of the drill with the seed-box removed, but its position shown by *red* [dotted] lines to show the parts underneath it. Figure 2 represents the crank-rod or shaft to which the front ends of the drag-bars are attached, *when detached from the machine*. Figure 3 represents an end view of the drill with the wheels removed, to show the parts behind it, and representing, by *black*, [full and] dotted, and *red* lines, the several operative parts, and their positions under the changes of the machine or of its parts. Similar letters of reference, *where they occur in the separate figures*, denote *like* [corresponding] parts in all of the drawings, [figures.] The object and purpose of my invention are [is] to shift or change the seeding-shoes or hoes from a straight to a zigzag line, and *vice versa*; and, further, to so hang the shoes or hoes as, in addition to *this* [the] shifting process, to admit of being raised separately, or the whole series together, as may be found necessary.

\* \* \* Upon an axle, A, supported *in* [on] the usual carrying wheels, B B, is mounted a main frame, C, and on the main frame a seed-box, D, the slides of which may be operated in any of the well-known ways. In bearings, E, in the front portion of the main frame, is hung, so as to rock or turn therein, a zigzag or crank-shaft, F, shown detached in figure 2, and to the *cranks* [crank] or wrists, *a a a*, of this shaft, are connected, *seriatim*, the drag-bars, *b b b*, by means of bows or yokes, *c*, each bow or yoke taking two of said wrists, as shown in figure 1. To the rear ends of these drag-bars, *b*, are attached the shoes or hoes, G, in any of the usual well-known ways. In the projecting rear portion of the main frame, C, there is hung a shaft, *d*, upon which there is a lever, *e*, by which it can be rocked or rolled in its bearings. At suitable distances upon this shaft, *d*, there is placed a series of levers, *f f*, one for each shoe or hoe, which are kept in their proper positions on the shaft by pins, T T, or other suitable devices, but which can be moved independent of the shaft, or of each other, or all together, as will be explained. The levers *f*, have a hub or swell, *g*, at their central portions, where they are slipped onto the shaft, *d*, and into each one of these hubs is set a pin, 2, which is above the pins, T T, in the shaft, so that each lever can be turned upon the shaft; but when the shaft is rocked or turned, then all the levers are worked simultaneously. To the forward ends of these levers, *f*, the shoes or hoes are respectively connected by a link or hinged rod, *h*, the rearward projecting ends of said levers serving as handles for the operator to seize and work separately, when necessary to do so, or he can raise the whole series by seizing and working the lever, *e*. One end of the shaft, *d*, projects through the timber of the main frame, for convenience of placing the parts, and upon it is a lever, H, and a spring-locking lever, *i*, connected with it, both of which levers the operator may grasp at once, and by pressure, first unlock the catch and then move the main lever, H, and the shaft, *d*, as well as the parts connected with it. The catch or locking lever, *i*, locks into or against *a* [the] stop-plate, *j*, on the main frame, when not otherwise controlled. The upper portion of the lever, H, serves as a handle to work it by, and to the lower end of it is pivoted a rack-bar, [or connecting-rod,] *m*, which takes into a pinion, *n*, fastened on the end of the crank or zigzag shaft, F, and when the pinion, *n*, is turned, the crank-shaft is also turned, and as it is turned it shifts the shoes or hoes into a zigzag or a straight line, as the case may be. When the lever, H, and the zigzag shaft, F, [and the connecting bar, *m*,] and their several connected and operative parts, are in the positions shown by the *black* [full] lines in figures 1 and 3, the shoes or hoes, G, are then in a straight line across the machine; but when the lever, H, is shifted into the position shown by the *red* [dotted] lines in figure 3, it turns the shaft and moves the parts connected with them, and the shoes or hoes will then stand in a zigzag line across the machine, as shown by the *red* [full] lines, or in what may be termed two lines, one in advance of the other, and [in order] that the shoes or hoes may be thus moved into one or two lines, and still be susceptible of being raised up separately, or in their series capacity, their connections and [the] attachments must all be hinged or yielding. When there is an odd number of shoes or hoes on the machine, the odd one should be in the rear series, in which case there would be no necessity of locking the lever, H, when the shoes *were* [are] so

arranged, as the greater resistance on the greater number would always keep them so; but if an even number of shoes be used, and an equal number in each row, then the lever would have to be locked or fastened in both of its positions. It is obvious that other mechanical devices may be used for shifting the shoes or hoes from a straight into a zigzag line, or *vice versa*. I have devised several ways of accomplishing this movement. [The rack-bar or connecting-rod, *m*, may be used for this purpose, and thereby the shoes or hoes may be shifted from a straight to a zigzag line, or *vice versa*, said connecting-bar, *m*, being held in position, if desired, by any of the usual mechanical devices for that purpose; second, by means of] *as, for instance*, a sheave, pulley, or chain-wheel, [which] may be keyed to the end of the crank-shaft, and to this wheel or sheave a chain may be attached, and, passing around it, *extend thence to the lever*, so that, *by working the lever*, [means thereof,] the same effect *would* [can] be attained by the rack and pinion.

"Another plan may be as follows: A crank or cross-arms may be placed on the turning shaft, as by means of [a] connecting [rod or] rods *which connect the cranks or arms with the levers*, the shaft may be turned [by the operator] and the shoes thus thrown into a straight or zigzag line, as may be desired; or, instead of [the crank shaft] *crank-shafts to shift the shoes*, the shoes may be united in sets to different bars, which may be straight, both bars being united to cross-bars or heads at their ends. Now, by shifting [the relations of] these two bars, [and by the means aforesaid, or by the connecting-rod, *m*, the operator can] *they will* shift the shoes [or hoes] attached to them, *and change them* into the *positions* [position] hereinabove described. When the hoes are set in a zigzag line, as above mentioned, and are in that position raised up, a pin, 3, in the extreme end of the shaft, *d*, will take against a pin, 4, in the lever, *H*, and thereby shifting the hoes into more nearly a straight line as they rise, or into quite a straight line, depending upon the extent to which they are raised."

Reading in the foregoing what is outside of brackets, including what is in italics, and omitting what is inside of brackets, gives the text of the specification of the original patent. The claims of the re-issue, six in number, are as follows:

"(1) The shoes or hoes of a seed-planter attached to the main frame, substantially as described, whereby they may be simultaneously shifted from a straight to a zigzag line, or *vice versa*, by a single movement. (2) The shoes or hoes of a seed-planter attached to the main frame, substantially as described, in combination with a lever, or its equivalent, whereby they can be shifted, at the pleasure of the operator, from a straight to a zigzag line, or *vice versa*. (3) The shoes or hoes of a seed-planter attached to the main frame, substantially as described, in combination with a rod, or its equivalent, whereby they can be shifted from a straight to a zigzag line, or *vice versa*. (4) A series of shoes or hoes that are capable of being changed from a straight to a zigzag line, or *vice versa*, in combination with independent levers connecting said shoes or hoes with the lifting-bar, whereby they can be raised by the operator individually or as a whole, substantially as described. (5) The shoe

hinged to both its drag-bar and its individual lever, so that it can be raised or lowered, in either of its changed positions, by a lever that is permanently located, substantially as described. (6) In combination with a series of shoes or hoes that are capable of being changed by the operator at the rear of the machine from a straight to a zigzag line, or *vice versa*, a shaft and lifting lever connected therewith, whereby the whole series can be raised at once by the operator to pass obstructions, substantially as described."

The claims of the original patent were three in number, as follows :

"(1) So attaching the shoes or hoes of a seed-planter to the main frame, as that by means of a lever, or its equivalent, said shoes may be shifted from a straight to a zigzag line, or *vice versa*, at pleasure, substantially as described. (2) In combination with a series of shoes or hoes that are capable of being changed from a straight to a zigzag line, or *vice versa*, the so connecting of said shoes by independent levers to the lifting-bar, as that they be raised by the operation individually or as a whole, substantially as described. (3) Hinging the shoe to both its drag-bar and to its individual lever, so that the shoe may be raised and lowered, in either of its changed positions, by a lever that is permanently located, substantially as described."

Claim 1 of the original is substantially the same as claim 2 of the re-issue. Claim 2 of the original is substantially the same as claim 4 of the re-issue. Claim 3 of the original is substantially the same as claim 5 of the re-issue. The original specification stated that there were two objects in the invention. One was stated to be to shift or change the seeding shoes or hoes from a straight to a zigzag line, or *vice versa*. It is plain from the text, and from the mechanical construction of the apparatus, that the shifting was to be done by the operation from the rear of the machine, and without stopping the machine, and that all the shoes which were to be shifted were to be moved simultaneously and not successively.

The particular method shown was to have in the front part of the machine a turning-shaft, with cranks on it so arranged that the shaft did not have a straight, continuous axis, but had sets of axes in different lines, alternating, so that yokes being attached, each to two of the cranks, and each two of the cranks having axes in a different line from the line of the axes of the next two adjoining cranks, the yokes being of substantially equal length, and being connected by drag-bars at the rear ends of the drag-bars to the shoes, a rotating movement given to the crank-shaft would shift the shoes by moving all of them, each alternate shoe moving in an opposite direction from the direction in which every other alternate shoe moved, and thus a space being opened or closed of double the distance through which any shoe traveled. The particular method of producing the shift-



ing, shown in the drawings and model, was to have a cross-shaft in the rear part of the machine, and an upright lever on the end of it extending up for a handle, and below having pivoted to it a bar running forward, and made in its forward end into a rack, working into a pinion on the end of the crank-shaft. Moving the lever worked the rack and pinion, and turned the crank-shaft and shifted the shoes. The extent of the extreme rotating movement of the crank-shaft was about half a circle back and forth. It is perfectly obvious that when the principle of the shifting of the shoes by so attaching them to a shaft having a rotating movement that such rotating movement of the shaft would shift the shoes attached to the shaft, was embodied in machinery, and one method of imparting such rotating movement to the shaft was embodied in machinery by a lever acting through a rod and a rack and pinion, it was mere mechanical skill, and not invention, to substitute for the lever, rod, rack, and pinion some other mechanical means of giving such rotating movement to the shaft.

Accordingly, the original specification says that it is perfectly obvious that other mechanical devices may be used for shifting the shoes. It then suggests, as one mode, to have the lever, instead of working a rod, rack, and pinion, work a chain extending from it to and around a sheave or pulley keyed on the end of the crank-shaft. It also suggests that "a crank or cross-arms may be placed on the turning shaft, and by means of connecting rods which connect the cranks or arms with the levers the shaft may be turned." This evidently means that a crank or a cross-arm may be put on the end of the shaft in place of the pinion, and a connecting rod be run from the crank or the cross-arm to the lever, and be worked by it to rotate the shaft. It also says that "instead of crank-shafts to shift the shoes, the shoes may be united in sets to different bars, which may be straight, both bars being united to cross-bars or heads at their ends," and that "by shifting these two bars they will shift the shoes attached to them." The idea here is to dispense with the crank-shaft, and fasten some of the shoes to one straight bar and some to a second straight bar, and have cross-bars or heads at the neck of the two bars so uniting them that the bars may be shifted to shift the shoes. The idea seems to be preserved throughout of having a lever at the rear part of the machine, at the end of a connecting rod or a chain, and working thereby a pinion or a pulley on a shaft or two bars with shoes attached to them.

The defendants have a machine in which every alternate slide is

connected to an immovable part of the frame, and every other alternate slide is connected to a swinging cross-bar, which hangs down so as to have a rotating motion back and forth in the arc of a circle by reason of its being hung in bearings in the sides of the frame. A rod extends from nearly the middle of the width of the swinging cross-bar to the rear part of the frame, behind the line from which the shoes are suspended, which rod is supported in the center of its length, and terminates at its rear end in a handle, so that an operator can work it, and by pulling it shift simultaneously all the shoes that are attached to the swinging cross-bar. Two coiled springs are so arranged that when the rod is pulled the springs are compressed, and when the rod is released the action of the springs tends to throw the swinging cross-bar, and the shoes attached to it, towards the front of the frame again, restoring them to the position from which the pulling of the rod moved them. Thus, only alternate shoes are shifted, but the advantage of simultaneously changing the relative positions of the toes of the shoes to each other, and thus making a wider space in a straight line between any two toes at one time than at another, is secured, as in the plaintiff's arrangement.

In the defendants' machine the shoes are so set that their toes are never in a straight line across, but, when nearest to each other, are somewhat out of a straight line, and the pulling of the rod causes the distance between them to increase. The shoes which move, in increasing such distance, do so through the rotating motion to and fro of the swinging cross-bar to which they are attached, such motion being imparted by the pulling, at the rear of the machine, of the rod attached to the swinging cross-bar. In the plaintiff's machine the shoes which move in increasing such distance do so through the rotating motion to and fro of the crank-shaft to which they are attached, such motion being imparted by the pushing, at the rear of the machine, of the rod that carries the rack, the rod being worked by a lever. It makes no difference, so far as the use of the real invention of Davis is concerned, that in the defendants' machine only alternate shoes are shifted, and not all the shoes, and that the shoes which are not shifted are fastened to an unmoving bar, and that the actuating rod is in the length of the swinging cross-bar, and not at one end of it, and that the rotating motion of the points where the shoes are attached is accompanied by a hanging down of the swinging cross-bar, instead of having the bearings in the line of its axis, and that the actuating rod is pulled directly at its rear end instead of being pushed through a lever, and that the shoes are retracted by

springs, aided by the pushing of a rod, instead of by the pulling of a rod through a lever, and that the shoes are not nominally out of a straight line. These minor matters are all aside from the real invention of Davis, as disclosed by his original specification.

The next question is, what is secured by the claims of the patent, in view of anything shown to have existed before? Various alleged prior inventions and patents are set up in the answer. Testimony appears to have been taken only as to those of Powers, Slander, and Uring, in respect to shifting arrangements. The latter two were not insisted on at the hearing, and are not mentioned in the defendants' brief. Anticipation by Powers is strenuously urged as to the shifting arrangements. It is also urged that the defendants have done in that respect only what Powers did before Davis. Davis carries back his invention to September, 1866. Whatever Powers did he did in 1862. He was engaged in that year in making and selling farm implements, at Madison, Wisconsin. During the winter of 1861-2 and the spring of 1862 he was selling these grain-drills, with iron drag-bars. During the season of 1862, noticing the working of drills in the field, he conceived the idea that the shoes could be put into single and double ranks by a more easy method than then used. He worked out a plan and made a model of it, and applied for a patent thereon. The application was filed November 10, 1862. The patent was ordered to issue December 6, 1862, but was never issued. Why, does not appear. The specification filed states that the "invention consists of a device to enable the shovels or plows of a drill to be set in single or double rows or ranks, with greater ease and facility than hitherto." The method described, and shown in the drawings, is to have a cross-row of stationary shovels; a cross-row of other shovels attached to a cross-bar. This cross-bar is arranged at each end of it to slide to the extent of eight inches to and fro in a groove, and thus two rows may be made; or the sliding cross-bar may be set at a point where all the shovels are in a line, and thus one row be formed. The movable cross-bar is secured, when set, by bolts.

The claim covers "the method of double and single ranking the drill-teeth, by the adjustment of the sliding cross-bar, A, to which are attached the alternate drill-teeth or shovels to different positions between the side pieces of the frame." The description states that "by this device double or single ranking can be effected in a moment, instead of more tedious processes of other similar machines;" and that "double and single ranking is a highly-important feature in a drill to adapt it to different soils and circumstances." It is clear

that this shifting could not be produced in Powers' apparatus by an operator riding on the machine, nor without stopping the motion of the machine. There was no rod or means of actuating the sliding cross-bar, except to take hold of it by the hand, and slide it and fix it in place by setting movable bolts. Davis' actuating lever has connected with it a spring-locking lever, so arranged that both levers can be grasped at once; and, by pressing the locking lever towards the other lever, a catch is unlocked, so that the main lever can be moved. In the defendant's machine there is a locking device on the actuating rod at about the center of its length. This automatic simultaneous shifting device is a marked feature in both the plaintiff's and defendant's arrangements, and is wanting in the foregoing structure of Powers. Powers put the foregoing shifting arrangement "onto two or may be three drills" which he had on hand. He testifies to the use of two of them, and says they worked perfectly so far as changing the rank of the drill was concerned. He made a different style of drill for 1863, and then ceased to make drills.

We now come to what is more material. Powers says that "on one or more" of the machines containing the foregoing shifting arrangement he had the following device: He attached chains to the two ends of the sliding cross-bar and underneath, which chains went forward to the semi-discs of a rock-shaft in front of the front beam, to which was attached a hand-lever adapted to be reached and operated by the driver on the seat of the machine. By pulling this lever backward, the rock-shaft took up the chains, and brought the rear beam forward to the single-rank position. The lever was secured in position by a pin in a semi-circular guide, centering on the axis of the rock-shaft. When it was desired to double rank the shovels, the pin was removed, and the lever was allowed to sweep forward, which permitted the rear cross-beam to draw backward, when the drill was in motion, to double rank again.

Powers illustrates this arrangement by a drawing marked "Powers, No. 2." Powers says that he does not know what became of these drills; that he had taken out a patent on grain drills in 1862, before making said application; that he has no recollection of applying for a patent for the hand-lever shifting device; that that was got up after the application of November 10, 1862, was filed; and that he thinks he filed an application for another patent on grain-drills after the application of November 10, 1862. He testifies as follows:

"Cross-question 32. At what season of the year, and in what year, was this lever device attached to this machine above referred to? *Answer.* I think it was in the fall or early winter of 1862; most likely the latter part of November of that year. *Cross-question 33.* When was the machine used in the field, with all these attachments above described? *Answer.* It was used in the ensuing spring, I believe, but tried in the fall before, in earth, to see if the contrivance would work."

This is all that Powers says on this subject. He does not say that the machine with the hand-lever did work successfully, or that it was more than an experiment. The improvement of an actuating lever was a desirable one, yet no more were made. He does not say distinctly that more than one was made with the lever. His testimony as to use in the field is qualified by "I believe," and he tells of no other use but a trial, the result of which he does not give. He was not encouraged to make more or to apply for a patent, although he thought enough of the arrangement shown in the application of November 10, 1862, to make that application, and although he applied for another patent on grain-drills after the time when he alleges he devised the hand-lever arrangement.

Skinner gives no support to this hand-lever arrangement. He has no affirmative recollection of it. He remembers a drill, in Powers' shop, with a device by which the hoes were shifted from double to single rank, and *vice versa*. He saw the shaft made, but he does not remember the device for making it, except that there was a bar sliding horizontally, to which some alternate drag-bars were attached, and a stationary bar to which other alternate drag-bars were attached; nor does he remember what the device was for holding the movable bar in position. All this is referable to the machine described in the application for a patent, without the hand-lever arrangement.

Stowe testifies that in January, 1863, he thinks, he saw Skinner at Powers' shop, and they two saw a drill there with a device attached for shifting the shoes to single or double rank, and saw Powers work it with a lever which, when drawn back, moved the shoes forward by moving forward a sliding bar to which the shoes were attached.

Renter testifies to seeing at Powers' shop, during the fall of 1862, a grain-drill being built, which had a lever in the front part of the frame, with a roller, and a chain at each end of the roller, the chains running to a sliding bar, so that, by pulling the handle forward, it would bring the hoes into double rank. He was a workman for Powers at the time. He does not know what became of the machine. There was but one drill made so far as he knows.

Such recollection as Renter and Stowe testify to was evidently greatly stimulated by the exhibition to them of the drawing, "Powers, No. 2," and of a model of the arrangement. Their independent testimony is very weak. At most, however, whatever Powers did in the way of the actuating lever shown in the drawing, "Powers, No. 2," was a mere experiment. He acted as if he regarded it as of no value. It would have been of no value if it had been perfected. The reason why he threw it aside as valueless must have been because it was not perfected. The case is one falling within the principle of *Gayler v. Wilder*, 10 How. 477; *Hall v. Bird*, 6 Blatchf. 438; *Hartshorn v. Tripp*, 7 Blatchf. 120; *Cahoon v. Ring*, 1 Clifford, 592, 611, 612; and *Wilson v. Coon*, 19 O. G. 482; and not within the principle of *Coffin v. Ogden*, 18 Wall. 120.

What is shown in Powers' application of November 10, 1862, even if a perfected invention, embodied in working machines successfully used, does not anticipate claims 2 and 3 of the plaintiff's re-issue patent. Claim 2 of the re-issue is the same as claim 1 of the original. The defendants have thin shoes attached to the main frame, substantially as described in the original and re-issued patents, in combination with what is the equivalent of the Davis actuating rod, so that thereby the movable shoes, though not the immovable ones, are simultaneously shifted from one line to another, so that after the shifting all the shoes taken together, movable and immovable, form a line more or less zigzag than before. This was never accomplished, as a perfected invention, by any one before Davis. It is what Davis does and what the defendants do, and they thereby infringe claim 2 of the re-issue. The defendants' rod is within the plaintiff's arrangement. It is the material part of the plaintiff's simultaneously-actuating arrangement. Davis has the rod and the lever added to it. It is no invention to leave off the lever and retain the rod, and, instead of locking the lever, lock the rod. The lever in the one case pulls and pushes the end of the rod. The hand of the operator, in the other case, pulls and pushes the end of the rod. In having the rod and lever, Davis has the rod as well as the rod and lever. Claim 2 of the re-issue, being a claim to the lever, and so a claim to the lever and rod together, for the lever can shift nothing unless the rod is attached to it, is a valid claim, and is infringed if the rod, which is the material and essential part of it, is used, the rod being new with Davis as well as the lever. *Sister v. Father*, 8 Ell. & Blackb. 1004; *Sellers v. Dickinson*, 5 Exch. 312; *Adam. v. Thayer*, 17 Blatchf. 468.

Claim 3 of the re-issue is also valid, and is not open to the objection that it is not warranted by the original specification. The rod extending to the rear of the machine is the material thing in the actuating mechanism, and is fully described and shown in the original patent as the rack-bar. It is called a "connecting rod," and a "connecting bar," in the re-issue and not in the original; but that is immaterial. It is a connecting rod and a connecting bar. It connects the actuating lever with the crank-shaft as in the defendant's machine; it connects the actuating hand of the operator with the swinging cross-bar. The re-issue, in speaking of mechanical devices for shifting the shoes, says:

"The rack-bar or connecting rod, *m*, may be used for this purpose, and thereby the shoes or hoes may be shifted from a straight to a zigzag line, or *vice versa*; said connecting bar, *m*, being held in position, if desired, by any of the usual mechanical devices for that purpose."

This statement is not found in the original specification; but the rack-bar, *m*, is described and shown in the original, and it is shown there as used to shift the shoes, and it does shift them when its rear end is moved, as it is, by the lever shown. A locking lever is shown to hold the actuating lever in position, and it is only the skill of the mechanic, when the lever is dispensed with and the bar is retained, to hold the bar in position by a locking device. No additional support is given to claims 2 and 3 of the re-issue by calling in the re-issue the rack-bar a connecting rod, or by omitting in the re-issue the words "which connect the cranks or arms with the levers," as those claims are warranted by the original specification.

Claim 1 of the re-issue is not to be so construed, in view of what existed in any machine made by Powers, according to what is shown in his application of November 10, 1862, if to be regarded as a complete invention, as to cover what is found in such machine. The claim is to be construed as a claim to the shoes attached substantially as described, and capable, so far as they are movable, of being simultaneously shifted by a single movement; such movement being produced by mechanism in the machine, and not requiring the stopping of the machine or the removal of pins or bolts. So construed, claim 1 is valid, and is infringed by the defendant's machine.

Davis put his shifting invention into use, and granted licenses under his original patent. The form in which he used it in model No. 2 was substantially the embodiment of the same invention shown

in the drawings of his patent. It had no crank-shaft, but had a bar with short cross-bars fixed to it, and cross-arms extending between the cross-bars and drag-bars attached to these arms, and he dispensed with the rack and pinion, and prolonged one of the cross-bars near the middle of the length of the first-named bar, and carried a rod from it to the rear of the machine, to the lower end of a hand-lever on a shaft from which the shoes were hung, and so worked the shoes; the first-named bar turning as a shaft in bearings, and each alternate drag-bar being so attached to the first-named bar as to have, when attached, a rotating motion in the arc of a circle in a direction opposite to that of its adjacent drag-bar. An unsuccessful attempt is made to show that Davis' shifting arrangement, as embodied by him in machines, was impracticable and worthless. But it is shown to have been practically applied in the form of model No. 2, and in other forms.

Davis is clearly shown to have been the first person to make a successful machine for changing the shoes of a grain-drill into substantially two lines from substantially one line, by a shifting movement applied to any of the shoes by mechanism operating on and from the rear of the machine, and worked without stopping the machine or seriously interfering with its operation. His invention and patent are entitled to a liberal construction. Claims 1, 2, and 3 of the re-issue are not anticipated, and the re-issue is not invalid because for a different invention from the original.

As to claims 4, 5, and 6 of the re-issue they are infringed, and the foregoing view of the *status* of the Davis invention shows that those claims are not anticipated by the Jessup apparatus, or by any other prior structure. There is a patentable combination and co-action between the devices for shifting the shoes and the lifting devices for raising the shoes, either simultaneously or individually. It may often be necessary, after shifting has been determined upon, and while it is in process of being effected, to suddenly raise one or more, or all, of the movable shoes, because of some apparent obstruction in the path. So a compound motion of the toe of the shoe results, composed of a backward or forward motion, and an upward motion, resulting from the co-action of shifting and lifting. As the compound motion is a resultant of the two forces, so the two forces act in combination to produce the compound motion.

There must be a decree for the plaintiffs for an account and a perpetual injunction, with costs.



## CRANDAL v. WALTERS and another.\*

(Circuit Court, S. D. New York. December 13, 1881.)

## 1. LETTERS PATENT—BOX-LOOPS FOR CARRIAGE TOPS—REISSUE.

The original patent No. 95,004, September 21, 1869, was for "a box-loop, struck up or cast from one piece of thin metal, with lugs or spurs upon its edges, and applied to a carriage top by passing said lugs through the same and through a metal plate, and bending them down upon the surface of said plate." *Held*, that the invention was really of the *loop* ready to be affixed, and that the *plate* was only an adjunct, making the article better, but not of the essence of the invention, and that a reissue which claimed "the box-loop formed out of thin plate metal, with lugs or spurs projecting therefrom to affix it to a carriage top, either with or without the plate," was good and valid.

## 2. INFRINGEMENT.

Reissue No. 6,974, for a box-loop having a top and two sides, with lugs or spurs projecting from the edges or corners next the surface to which they are to be applied, *held* to be infringed by a loop having a closed bottom, with lugs punched out of the bottom.

## 3. NOVELTY—ADAPTATION OF OLD APPLIANCES.

Almost all inventions at this day that become the subject of patents are the embodiment and adaptation of mechanical appliances that are old. In that consists the invention.

## 4. DOUBLE USE.

Where an article exists in a given form, and applied to a given use, and is taken in substantially the same form and applied to an analogous use, so as to make a case of mere double use, there is no invention.

## 5. PRIOR DEVICE NOT ANTICIPATING PATENT.

A device will not anticipate a subsequent patent where it cannot be used as a substitute for the device described in the patent without invention.

In Equity.

*Neri Pine and Charles M. Stone*, for plaintiff.

*A. v. Briesen*, for defendants.

BLATCHFORD, C. J. This suit is brought on reissued letters patent No. 6,974, granted to Charles H. Davis, March 7, 1876, for an "improvement in box-loops for carriage tops;" the original patent, No. 95,004, having been granted to him September 21, 1869. The specification of the reissue is as follows, reading what is outside of brackets and what is inside of brackets, and omitting what is in italics:

"Figure 1 is a perspective view of the loop, with straps and buckles complete, attached to a piece of leather or section of a carriage top, B. Figure 2 is a perspective view of the loop ready for use. Figure 3 is a plate or cap used on the back or inside of the top, B, for securing the loop, A. Figure 4 is a cross-sectional view of the whole complete. Similar letters of reference indicate corresponding parts. My invention has for its object [an improvement in] to improve the construction of box-loops for carriage [tops,] trimmings, [etc.]

\*Reported by S. Nelson White, Esq., of the New York bar.

and it [It] consists in forming the loops [in] *from one piece of metal, either cast or struck up [into form from one single piece of plate or sheet metal,] with a series of [spurs or] lugs [projecting from the] upon its lower edges or corners next the surface to which they are to be affixed, which [spurs or lugs] lugs or spurs [pass] are passed through openings formed in the carriage top [or curtain] and [are clinched down tight upon it, and I introduce] through openings in a metal stiffening plate [on the opposite side] placed upon the under surface of the leather, [leather, as a stiffening plate, through which the spurs pass before they are clinched, as a further security in the fastening, by which form and construction I securely affix the box-loop to the curtain, etc.,] The lugs are then bent down or clinched upon the metal plate, thereby securely fastening the box-loop in place without the employment of rivets or screws. Box-loops, as usually constructed, are made of leather, and either sewed or riveted in [place,] place, and [They] are liable to be bent out of shape and torn from [their fastenings;] the rivets, [and this] This method [mode of construction and application] is [slow and] expensive, requiring the labor of skilled workmen, while, by my improvement, the box [loop can be] is easily applied [by any one] and [is] not liable to get out of order. In the accompanying drawings [which form a part of this description, figure 1 is a perspective view of the loop, either cast or struck up from thin metal, affixed in place with buckles complete. Figure 2 is a perspective view of the loop detached. Figure 3 is the stiffening plate, C.] A is a metal loop, either cast or struck up from [thin] sheet metal, preferably the latter. [latter, which] When formed of sheet metal the blanks are cut out by suitable dies, [with] leaving spurs or lugs [lugs or spurs formed at] H, H, upon [the] two [sides] opposite edges. [The loop is then] They are bent into the form [and stamped or embossed, as in figures 1, 2, or otherwise, which completes the manufacture of the loop, which is then ready to be affixed in its place, B, figure 1. To apply this loop to a carriage top, or elsewhere, the spurs or lugs, H H H, are thrust through holes or slits made therefor in the leather, and the ends are bent and clinched down upon the other side. Buckles may be affixed to their place on B, as in figure 1, in any convenient way, and the loop put over them and affixed to B. As an additional security, plates, C, (see figure 3,) are employed on the opposite side of the curtain, to stiffen and support the fastenings or supports, H, which are clinched down on them after passing through openings therein for the purpose.] shown in figure 2, to produce the loop. D is a strap or straps, each end passing around and through the buckle, E, and secured, in any proper manner, to the piece, B, of the carriage top. The piece, B, is provided with a series of holes upon each side of the strap, D, corresponding in number and position to the spurs, H, upon the loop. The loop is applied to the piece, B, by passing the spurs through these holes, as shown in the drawing, and through holes, X X, formed in the metal plate, C, laid against the inner surface of the piece, B. The lugs are then bent down or clinched upon the surface of this plate, thereby firmly securing the loop in place without the aid of rivets."*

Reading in the foregoing what is outside of brackets, including what is in italics, and omitting what is inside of brackets, we have

the specification of the original patent. The claim of the reissue is as follows:

"The loop-box, A, formed out of thin plate metal, as described, with the lugs or spurs, H, projecting therefrom, to affix it to a carriage top, either with or without the plate, C, substantially as and for the purposes specified."

The claim of the original patent was this:

"The box-loop, A, when formed as described with the lugs or spurs, H, upon its edges, and applied to a carriage top, by passing said lugs through the same, and through the metal-plate, C, and then bending them down upon the surface of said plate, substantially as described, for the purpose specified."

It is apparent that the article specified in the claim of the reissue is to be (1) a box-loop; (2) made of metal; (3) the metal so thin that the article can, if desired, be struck up from it; (4) the metal of the loop to be a single piece, bent into shape; (5) the lugs to project from the loop towards the surface of the material to which the loop is to be affixed; (6) the loop to be capable of being affixed by passing the lugs through the material and clinching them down tight upon the other side, the clinching being done by bending them at right angles, and no rivets or screws being employed. These characteristics are all found in the specification of the reissue in connection with its claim. They are all found in the specification of the original patent. The drawings of the two patents are the same. The model filed with the application for the original patent shows all the foregoing characteristics. The claim of the original patent was so framed as to seem to require that the loop should be actually applied to a carriage top, in order to infringe. It also required that the metal plate, C, should be used in such application. Makers of loops were not makers of carriages, and it was obvious that the invention was really of the loop ready to be affixed, and that the inventor was entitled to have a claim which would reach the maker of the loop. Besides, even if the claim of the original would have extended to the maker of the loop, it might have been questioned whether it would reach him when he made a loop without the plate, C; and it was plain that that was only a stiffening or strengthening plate, an adjunct, making the article better, perhaps, but yet not of the essence of the invention. The case was, therefore, one for a reissue.

It is objected that the specification of the original patent says that the series of lugs is on the lower edges of the loop; that is, projecting from the lower edges of the long parallel sides of the loop and in the same plane with such sides. The drawings and model show such a construction. The reissue says that the lugs project from the

edges or corners next the surface to which they are to be affixed. The plaintiff's loop has an open bottom, the metal being only on the top and the sides. The defendants make one form of loop with a closed bottom, and with lugs punched out of the bottom at three sides of the lug and bent down at the fourth side, ready for use, and standing at right angles to the sides of the loop and in the same plane with each other. To maintain non-infringement, and yet enable themselves to appropriate the real invention, they contend that the claim of the reissue is a departure from the invention shown in the original, (1) in making it necessary only that the lugs should project from the loop, without limiting them to being arranged as in the drawings, on the lower edges of the sides; (2) in making it necessary only that the lugs should be used to affix the loop, without its being necessary to use them by putting them through the carriage top; (3) in making it optional to use the plate, C. It is clearly a mere formal alteration, and within the invention, to put on the closed bottom and make the lugs project from it, instead of making them project from the edges of the sides. The closed bottom or fourth side is a useless expenditure of labor and material, so far as the real invention and the employment of it are concerned. The defendants' lugs project in a manner entirely equivalent; and if the claim of the reissue had said, as did the claim of the original, that the loop had lugs on its edges, it would have been proper to say that, for all practical purposes, the defendants' lugs were upon the edges, the variation being immaterial. The claim of the reissue is not capable of the construction that the lugs are to be used without putting them through the carriage top. It was no departure and no new matter to make the use of the plate, C, optional. To say that the lugs of the patent project from the edges or corners next the surface to which they are to be affixed, is just as accurate a description of them as to say that they are upon the lower edges of the loop. It is from the edges next the surface to which the lugs are to be affixed that the lugs project. There is no statement in the reissue that the lugs are not to project from the edges, and calling the edges corners does not alter their location. It is plain that the forms of loop shown in "Complainant's Exhibit 2" and in "Complainant's Exhibit 3" infringe the claim of the reissue, and that the reissue is not open to the objection that it is not warranted by the original patent.

The remaining question is that of novelty. Various old devices are introduced wherein sheet-metal prongs or lugs projecting through a material, such as leather or paper, and clinched by bending them,

held and secured the metal or other article to which they were attached on the other side of the materials. This idea was old, and was embodied and used by Davis. But no article like the plaintiff's, capable of being taken and used for the purposes for which the plaintiff's can be used, without alteration and adaptation requiring invention, existed before. Almost all inventions at this day, that become the subject of patents, are the embodiment and adaptation of mechanical appliances that are old. In that consists the invention. When the thing appears it is new and useful. No one saw it before; no one produced it before; it supplies a need; it is at once adopted; all in the trade desire to make and use it; yet it is said to have been perfectly obvious, and not to have been patentable. Where an article exists in a given form and applied to a given use, and is taken, in substantially the same form, and applied to an analogous use, so as to make a case of merely double use, there is no invention. But it is very rarely that a thing of that kind secures a patent.

A patent to Joseph E. Ball, No. 20,246, granted May 18, 1858, for a mode of attaching the traces of harness for horses to the draught plates or straps, is adduced. Ball's apparatus could never be used as a loop for a carriage top. The metal was not so thin that it could be practically struck up from a single piece and be bent into shape. The lugs could not be practically clinched by bending them, but were secured as rivets, by a process entirely inapplicable to the use of a loop on a carriage top.

A patent granted to Robert Meyer, No. 61,628, January 29, 1867, for a buckle fastening, is relied on. That does not show lugs clinched by bending, but shows only pins secured by riveting. For some purposes, in considering questions arising on letters patent, bent lugs and riveted pins may be the equivalents of each other; but, in considering the question of the novelty of the plaintiff's loop, riveted pins are not the equivalents of the bent lugs. The Meyer device could not be used in place of the Davis device without adaptation requiring invention.

The defendants also introduce a patent granted to Charles H. Littlefield, No. 67,322, July 30, 1867, for an improvement in breastplates for harnesses. It is a piece of metal bent into a loop at one end to hold a buckle, and allow the tongue of the buckle to pass through a slot made in such bent end, and having wings or projecting pieces turned over so as to overlap a harness strap. This could not be used as a substitute for the plaintiff's loop without invention. It

is easy after the desired thing is obtained to see how an old thing could have been adapted or altered.

The Ball, the Meyer, and the Littlefield patents were all of them considered by the patent-office in granting the original Davis patent, and the Ball patent was again considered by it in granting the reissue, as appears by the record.

The defendants also adduce English patent No. 1,204, dated May 13, 1859, to William S. Thomson, for "improvements in the manufacture of hooped skirts." Their expert, with the Davis device and the Thomson device before him, has cut away parts of the former and claims to have converted it into the latter. It may not be difficult for ingenuity, with both articles in view, and with the problem given to convert the later one into the earlier one, to do so. But the inventor of the earlier one had only that one, and did not produce the later one. There is nothing in the Thomson device to suggest the Davis box-loop. It required adaptation and invention to convert it into the box-loop. An exact reproduction, in a model, of figure 8 of the drawings of the Thomson patent shows that there is no identity between it and the Davis structure.

The French patent to Fransson, No. 25,417, granted November 15, 1855, for a clinched fastening for gloves, may also be dismissed. It contains several features which are availed of in the Davis loop, yet to pass from it to that required adaptation beyond that existing in a mere double use.

It is not necessary to allude to the numerous other old patents introduced by the defendants. The foregoing remarks apply to all of them, and also to the alleged prior structures, respecting which oral testimony is given. Attention is directed by the defendants to an exhibit of theirs marked "Bolt-guide and Catch," alleged to represent a prior structure. The exhibit is not claimed to be a structure which was actually made before Davis' invention, but only to represent one. It is a bolt-guide consisting of a metal plate, with two three-sided metal loops on it, each loop open at its two ends, which open ends are lengthwise of the plate, this plate being intended to be placed on one article, and of another metal plate, with one three-sided metal loop on it, open at its two ends, which open ends are lengthwise of the plate, this plate being intended to be placed on an adjoining article. Each loop has on it, projecting downward from the lower edge of each vertical side of it, a spur or lug, integral with it, and passing through a slot in the metal plate, and bent over and clinched down on the opposite side of the plate. The exhibit in question is intro-

duced by a witness who states that it is "a guide for a sliding bolt and a catch into which the bolt would slide when the article is put in use," and that he has known articles similar to it to have been in public use and on sale in the United States for nine and one-half years before January 15, 1881. This would carry it back to July 15, 1871. The application for the original Davis patent was filed April 22, 1868. Moreover, the attention of the witness was not directed to the feature of the bending over of the lugs, to clinch them, as distinct from riveting them. It does not appear that the metal used prior to Davis' invention, in making any such bolt-guide and catch, was so thin that the article could be or was struck up from a single piece of metal. Another witness states that, to his knowledge, bolt-guides were made on the plan of said exhibit, but larger, nearly 20 years before January, 1881, the loops being fastened to the bottom plate, 20 years ago, the same as in the exhibit, clinched to the back of the plate. On cross-examination he says that they were made of heavier metal, some of them. He then testifies:

*"Cross-question 10. Were not the ends of the hasp or staple headed down on the plate by a blow of the hammer, as in riveting, instead of being bent over or clinched, as in defendants' exhibit 'Bolt-guide and Catch?' Answer. As a general thing they were made in that way,—riveted with a hammer to form a clinch; they were not riveted to form a head like a boiler rivet, but were bent over like the exhibit."*

Again he says that they were mostly made for heavier purposes than the exhibit. The defendant's expert says that the exhibit could be attached to a carriage curtain. The plaintiff, in his testimony as a witness, gives evidence throwing doubt on the view that the lugs in any bolt-guide were not headed down by riveting. On the whole evidence it must be held that the prior existence of the bolt-guide, made of metal so thin that the article could be struck up from a single piece of it, and with lugs clinched by bending and not riveting, is not satisfactorily shown. Besides all this, it is plain that the bolt-guide never did and never would suggest Davis' box-loop.

There must be a decree for the plaintiff for an account of profits and damages, and a perpetual injunction, with costs.

## THE BUCKEYE.

(District Court, N. D. Illinois. December 12, 1881.)

## 1. COLLISION—LIGHTS.

The fact that the libellants' boat did not display the lights required by law is no defence to an action for damages by a collision, when the want of lights did not cause or contribute to it.

## 2. CHICAGO RIVER—NEGLIGENCE.

*Semble*, that it is negligence for any craft to navigate the Chicago river, between the Main-street bridge and Allen's slip, during the season of navigation, and when the stream is crowded with other craft either moving or moored to the bank, at a greater rate of speed than three miles an hour.

## In Admiralty.

*Schuyler & Kremer*, for libellants:

*W. H. Condon, R. S. Tuttle, and Mr. Mitchell*, for respondents.

BLONDETT, D. J. This is a libel by the owners of the steam canal-boat Montauk against the steam-propeller Buckeye, for damages by a collision in the waters of the south branch of the Chicago river, between the Buckeye and the Montauk, on the evening of August 19, 1880, whereby the Montauk was sunk and her cargo proved a total loss to its owners.

Norton & Co. file the libel in their own behalf, as owners of the Montauk, for the damages and demurrage sustained by them as such owners, and also in behalf of the insurance company who had issued a policy to them upon the cargo, and who have paid for the cargo as a total loss. The claim on the part of the libellants is that the collision was occasioned by reason of the negligent handling of the Buckeye while she was proceeding down the river; while the respondents, the owners of the Buckeye, insist that the collision was wholly occasioned by negligence on the part of those in charge of the Montauk. It appears from the proof, and is undisputed, that the collision occurred in the river near the south line of Allen's slip, where the river is about 130 feet wide from dock to dock; and on the part of the libellants it is claimed that the Montauk was on the west side of the center of the river; and within 15 or 20 feet of the west bank; while on the part of the respondents it is contended that the Montauk was, by reason of the negligence of those in charge of her, in the middle or east of the middle of the river at the time she was struck by the Buckeye. The undisputed facts in the case are that between 7 and 8 o'clock of the evening in question the steamer Buckeye was coming



down the river, passing through the west draw of Main-street bridge. When in the draw her officers heard a single blast of a whistle from the Montauk, which was then coming up the river, indicating that the Montauk would keep on her starboard side, which was the west side of the river. The Buckeye responded with one whistle, indicating that she would keep upon her starboard side, or the east side of the river going down. The Buckeye kept on down the river, and when just at the south line of Allen's slip, about 700 feet below the bridge, the bow of the steamer struck the port bow of the Montauk about three feet from her stem, injuring her so severely that the Montauk was hauled into Allen's slip, where she sunk within half an hour. It is conceded that the Montauk had no lights displayed at the time of this collision, and it is contended on the part of the respondents that the negligence of the Montauk in not displaying the lights required by law, and also the fact that the Montauk was not upon her side of the river, or not close enough to her own side of the river, caused the collision; and that those in charge of the Buckeye were not guilty of any such negligence as should make her liable.

The law requires vessels navigated by steam to carry the lights required by law in all weathers, between sunset and sunrise. Rule 2, § 4233, Rev. St. And it is clearly shown by the proof, in fact admitted, that the collision occurred after sunset, and that the Montauk had no lights.

But it is contended on the part of the libellants that the collision in this case did not occur by reason of the want of lights on the Montauk; that it was still sufficiently light to enable those in charge of the Buckeye to see the Montauk plainly, and to have taken timely measures to have avoided the collision. And it is undoubtedly well settled that the mere fact that the lights were not burning on the Montauk, as required by law, is not a defence here, unless this fact caused or contributed to the collision. *The Tillie*, 13 Blatchf. 514; *The Miranda*, 6 McLean, 221; *The Farragut*, 10 Wall. 334; *The Dexter*, 23 Wall. 69; *The Wanata*, 95 U. S. 600. The position of libellants is that, even if it was after sunset when the collision occurred, it was still light enough so that those on the Buckeye could plainly see the Montauk, and should have seen her in time to avoid a collision; and if they negligently failed to do so, they cannot successfully invoke the fact that the Montauk was violating the statute law in regard to signal lights. In other words, the question in this case is, does the testimony, when all considered, satisfy the mind that

the collision would probably have occurred, even if the lights had been properly set and burning upon the Montauk at the time?

The chief contradictions in the testimony are as to the precise moment of the collision, and the degree of light at that time; the time being in fact immaterial, except so far as it bears upon the question as to the amount of light at and immediately before the collision. The witnesses on the part of the Buckeye insist, some of them, that it was "pitch dark," others that it was "very dark," and others that it was "thick dusk" at the time the collision occurred. While, on the part of the libellants, the witnesses state that it was "light;" that it was "clear light," "not dark;" that objects like the Montauk could be seen a long distance,—some say a mile, others say half a mile, others say several blocks, but all insisting that it was light enough for those on the Buckeye to have seen the smoke of the Montauk at the time the two boats respectively sounded their whistles for their sides of the river, and when they must have been about 900 feet apart. It is possible that, owing to a bend in the river, the hull of the Montauk may not have been visible from the deck of the Buckeye while in the draw of the bridge, but her whistle was heard and her smoke could have been seen.

From a very careful review and analysis of this testimony, I have come to the conclusion that it was light enough for those on the Buckeye to have seen the Montauk, long enough before the collision occurred, to have shaped their course so as to have avoided the collision. That it was not "pitch dark" nor "very dark," nor even dim daylight or dusk, is evident from the respondents' own witnesses. Many of them who testify to this intense darkness seem to have been able to observe objects in every direction except that in which the Montauk lay; and even the lookout upon the Buckeye says that when he discovered the Montauk she was 200 feet or more away, and that he did not report her to the captain, who was the officer of the deck, because the captain could see her himself. The river at the place where this collision occurred, for a long distance above and below it, is very crooked, and it is no doubt incumbent on tugs and other vessels moved by steam to proceed either up or down the river very cautiously. The evidence in the case satisfies me that the Montauk was going quite slowly and the Buckeye going very fast. Those in charge of the Buckeye say she was going from three to five miles an hour. Witnesses differ very much as to the rate of speed of the Buckeye, but the established fact, if anything may be said to be established by

this proof, is that the Buckeye proceeded down the river nearly 700 feet after sounding her whistle to indicate which side of the stream she would take, while the Montauk progressed up the stream only about 200 feet in the same time. The witnesses on the Montauk and those upon the shore, or on other vessels in the vicinity, say she was not going over two miles or two and one half miles per hour. If her speed was two, or two and one half miles, certainly the Buckeye must have been going over six miles an hour at the time, because she covered within the same time more than three times the distance passed over by the Montauk.

As to the question whether the Montauk was in the middle of the river, or east of the middle of the river, as is claimed by the respondents, I think the preponderance of the proof shows that she was west of the middle of the river. The proof shows that the barge Irish lay upon the west side of the river, just north of the entrance to Allen's slip,—far enough north, so that her jib-boom and forward hamper did not interfere with the entrance to the slip. In going up the river, the Montauk, having in tow the canal-barge Lockport, was obliged, of course, to swing out from the west bank of the river far enough to avoid colliding herself or her tow with the Irish, and this would carry her towards the middle of the river,—the river, as I have said, being there about 130 feet wide. After the Montauk had passed the Irish she would naturally, as she intended to go through the west or starboard draw of the Main-street bridge, which she was approaching, hug closely to the west or starboard side of the river, and I can see no evidence that she did otherwise. It is possible that she was very near the middle of the river; because, to avoid the Irish, she would have to swing nearly or quite into the middle of the stream, and she might not have regained the west side, as she had only gone a little more than her length beyond the Irish just before the collision, and when her captain saw the Buckeye coming onto her, the wheel of the Montauk was undoubtedly put further to port for the purpose of throwing her still further over to the starboard side of the river; and, from the manner in which the two vessels came together, there can be no doubt, I think, that the bow of the Montauk was bearing towards the west or starboard, so as to present her port bow to the Buckeye. And the proof also shows that immediately after receiving the blow the Montauk swung around crosswise of the river, so that she reached nearly across the river, and the fact that she did thus swing crosswise of the river from the impetus of the blow or collision.

ion, convinces me that she received the blow in such a manner as that her bow must have been west of the center of the river; otherwise her stern would have struck the east bank before she swung around squarely across the river. Besides this, I can see no reason or motive for the Montauk being upon the east side of the river. The proof clearly shows, by the testimony of witnesses on both sides, that the officers of the Buckeye knew that the Montauk was going up stream, and that she had given them the signal, to which they had responded, as to the side upon which she would come. Between the Main-street bridge and Allen's slip there is a bend in the river which somewhat obscures the view in a direct line to a person standing upon the docks; but a man standing upon the bow of a steamer like the Buckeye, which was running light, with her bow high out of water, on account of her machinery being in her stern, could undoubtedly have seen the Montauk plainly from the time the Montauk sounded her whistle, and, even if he did not see her, it was not by reason of the darkness of the night, but by reason of the bend in the river and the lumber piled on the deck. He had notice that she was there; that she was coming up the river; and that she would be upon the starboard side of the river; for her whistle had told him all this. It was, therefore, his duty to go slowly and cautiously; and more especially was it his duty, if, knowing that the Montauk or any other steamer was coming up the river, he was unable, by reason of the crookedness of the river, to see her, to go very cautiously. The crooked river and even the approaching darkness imposed additional caution upon those in charge of the Buckeye, and they should have gone more moderately, should have slackened speed, and, if necessary, stopped; but, instead of doing so, it would seem from all the proof that the Buckeye was going down the river at a rate, as I have said, of six or more miles an hour, where the river was so crooked that it was extremely difficult to see objects more than a few hundred feet ahead, which, under the circumstances, can be called little short of recklessness. As a rule, I think, it may be said to be negligence for any craft to be moving in that part of the river faster than three miles an hour during the season of navigation, and when the stream is crowded with other crafts either moving or moored to the docks; but whatever may be the rate or speed, the craft should be completely under control, so that she can be stopped, or her course changed promptly.

But the captain of the Buckeye says that when he discovered the

Montauk, instead of shutting off steam and reversing, if necessary, he put on additional steam, hoping to swing his steamer, as he says she was then swinging, to starboard more rapidly, so as to avoid collision with the Montauk. Granting that he did not discover the exact locality of the Montauk until just as he was turning the bend above Allen's slip, which I can hardly believe to be true, he could then have stopped before striking her if he had promptly reversed his engine. I cannot avoid the conclusion that the conduct of the master of the Buckeye savors strongly of recklessness in the speed with which he was going down the river, and the maneuvers which he adopted to avoid a collision after he says he discovered the Montauk. I have carefully looked over the proof, and considered whether this is a proper case to divide the damages, but can see no evidence of mutual negligence. The only ground for it is the assumption that the Montauk was on the east side of the river, which I do not think sustained by the proof. The proof in the case, when carefully considered and analyzed, satisfies me that this collision did not occur later than 7:30 o'clock in the evening. The sun set that night at 6:58, so that it was, at most, only a little more than half an hour after sunset; and this, on a summer night, would not make it so dark, even if it was quite cloudy, that an object as large as the Montauk could not be plainly seen on the water at least twice the distance from the bridge to Allen's slip. The map of that part of the river which is in proof in the case shows that it is over 700 feet from the west draw of the bridge to the point where the collision occurred, and that even if the Buckeye steered directly over to the east side or to the east half of the river immediately after passing through the draw, she would have a plain view of the whole river to a point below Allen's slip as soon as she reached a point opposite the mouth of the gas-house slip, and she would then be over 400 feet above the point of collision, and probably 500 feet away from the Montauk. Let any one interested in the solution of this question of fact, as I have been ever since I have heard this case, notice from evening to evening the amount of light remaining, even in a cloudy evening, and at this season of the year, for 30 or 40 minutes after sunset, and I think he can hardly avoid the conclusion that there must have been on the evening of August 19, 1880, ample light at 7:30 o'clock to have enabled those on the Buckeye to have seen and avoided the Montauk. The night or evening was not phenomenally cloudy or dark, but merely an overcast or cloudy evening.

I come, therefore, to the conclusion that the collision in question

was not contributed to or caused by the absence of lights, but that it was occasioned by the negligence of the master and those in charge of the Buckeye. The exception to the commissioner's report will be overruled, and a decree entered in accordance with the findings of this report.

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THE WILLIAM COX. \*

(Circuit Court, S. D. New York. September 12, 1881.)

1. APPEAL—COSTS.

Where both parties appeal, and the decree of the lower court is affirmed, neither party recovers costs of the appellate court.

*Beebe, Wilcox & Hobbs*, for libellant.

*E. D. McCarthy*, for claimants.

BLATCHFORD, C. J. In this case I entirely concur in the views of the district judge, and his conclusion, in his decision in the court below, based upon the rule laid down by that court in the case of *The William Murtaugh*, 3 FED. REP. 404, which rule is a proper one for the protection of property and life. There must be a decree for the libellant for \$733.05, with interest from January 28, 1881, and for his costs in the district court, taxed at \$265.85. As both parties appealed to this court, and the decree below is not disturbed, neither party is to recover costs of this court.

\*See 3 FED. REP. 645.

## WARREN and others v. MOODY and another, Assignees.

*(Circuit Court, M. D. Alabama. December, 1881.)*

## 1. EQUITY—APPEAL—AMENDMENT OF SUBSTANCE.

On appeal in equity from the district court of the United States, the circuit court can permit an amendment of substance.

## 2. SAME—SAME—SAME—PRACTICE.

In the circuit court, there is no settled practice to allow such amendments in appeal cases in bankruptcy.

## 3. SAME—SAME.

It seems, that in admiralty and revenue cases brought to that court on appeal the practice is well settled to allow amendments of this nature

In Bankruptcy. On appeal.

*E. Bragg*, for complainants.

*C. Clopstock* for respondents.

PARDEE, C. J. This case is a cause in equity, originally brought in the district court to set aside a fraudulent conveyance of a bankrupt, and after final decree in that court has been appealed, under section 4980, Rev. St., to this court. It came up for hearing at last term, when an amendment of substance was allowed to the original bill, and the cause continued to allow the defendant to meet the amended bill by motion to strike out or answer or plead, as counsel might advise. The defendant moves to strike out the amendment, and this motion presents the question whether it is allowable on appeal in equity to permit amendments to pleadings.

In *Kennedy v. Georgia State Bank*, 8 How. 610, it is said:

“There is nothing in the nature of an appellate jurisdiction, proceeding according to the common law, which forbids the granting of amendments. And the thirty-second section of the judiciary act of 1789, (now Rev. St. § 954,) allowing amendments, is sufficiently comprehensive to embrace causes of appellate as well as original jurisdiction.”

And then the court cites *Anon.* 1 Gall. 22, in which case Justice Story, in a forcible argument, holds that amendments may be allowed in appellate courts.

This would seem to settle the question, but counsel claims that this power claimed in 8 How. and under section 954 goes only to amendments of form and not to amendments of substance. In *Jackson v. Ashton*, 10 Pet. 480, an amendment to aver citizenship, so as to give jurisdiction, was only refused because application came too late. In *Garland v. Davis*, 4 How. 155, the right to amend was recognized, but the case was remanded because of the practice of re-

manding cases to allow amendments as prevailing in the supreme court. In *Fletcher v. Peck*, 6 Cranch, 87, by consent the pleadings were amended by giving substance to a plea otherwise bad.

Numerous cases can be cited where cases have been remanded by the supreme court to allow amendment, none disputing the power or authority of the appellate court to allow the amendment, but alleging the practice against it. 8 How. 610, before cited.

So that the power of the appellate court to allow amendments may be taken as established, and it remains to be determined only whether there is any well-settled practice of this court against it, and requiring a remanding of the case to do substantial justice. This court is mainly an appellate court for admiralty and revenue cases, and it is only under the bankrupt law that it has any other appellate jurisdiction of any moment. In the two former classes of appeals the practice is well settled to allow the amendments. In the last class there is no practice settled that has been called to my attention. Section 636, Rev. St., would seem to give authority to the circuit court to try every appeal case *de novo*, as it may direct such judgment, decree, or order to be rendered, etc., as the justice of the case may require.

I think the amendment was properly allowed in this case, but it should have been on terms which, however, can be corrected in the decree. The motion to strike out is denied, whereupon the complainants are entitled to a decree *pro confesso*, which is granted—the appellants to pay the costs of the district court and the appellees the costs of this court.

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### UNITED STATES *v.* HOWELL and others.

(Circuit Court, W. D. North Carolina. October Term, 1881.)

#### 1. STATE EXEMPTION LAWS.

State exemption laws are inapplicable to debts due from a citizen to the United States.

#### 2. CASE STATED.

Upon a return of no property found in excess of the homestead and personal property exemptions allowed by the constitution and laws of the state upon execution for any debt, on motion by the United States district attorney for an *alias* execution to be issued to the marshal, and for an order of court directing him to make a levy and sale of the property without regarding such exemptions, *held*, that he was entitled to the order asked for.

In this case an execution was issued upon a judgment obtained by the United States against the defendants upon a warehouse bond, and the marshal made return to this term of the court that no levy was made, as no goods



and chattels, lands and tenements of the defendants could be found in excess of the homestead and personal property exemptions allowed by the constitution and laws of the state upon execution for any debts. James E. Boyd, Esq., United States district attorney, made a motion for an *alias* execution to be issued to the marshal, and that he be directed by an order of court to make a levy and sale of the property of the defendants, without regarding such exemptions.

DICK, D. J. The constitution of this state, in article 10, §§ 1, 2, provides as follows:

"The personal property of any resident of this state, to the value of \$500, to be selected by such resident, shall be, and is hereby, exempted from sale under execution, or other final process of any court, issued for the collection of any debt."

"Every homestead, and the dwelling and buildings used therewith, not exceeding in value \$1,000, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town, or village, with the dwelling and buildings used thereon, owned and occupied by any resident of this state, and not exceeding the value of \$1,000, shall be exempt from sale under execution, or any other final process obtained on any debt. But no property shall be exempt from sale for taxes, or for payment of obligations contracted for the purchase of said premises."

Various laws have been enacted by the state legislature for the purpose of securing and carrying out these constitutional provisions. It has been decided by the supreme court of the United States, in *Edwards v. Kearzey*, 96 U. S. 595, and subsequently by our state supreme court in *Earle v. Hardie*, 80 N. C. 177, that the second section of article 10 of the state constitution of 1868, which exempts from execution real property of a resident debtor, not exceeding in value the sum of \$1,000, is void against pre-existing debts, being in contravention of the constitution of the United States, which inhibits a state from passing a law impairing the obligation of contracts.

In *Lamb v. Chamness*, 84 N. C. 379, it is decided that the homestead of a defendant bankrupt is protected from sale under execution by operation of the amendment to the bankrupt act of 1873, without regard to the date of the judgment lien. After many elaborate arguments and decisions in the courts, and with the aid of frequent legislative enactments, the rights of homestead and personal property exemptions provided for in the state constitution are well defined and established as to debts due to individual creditors.

Every resident debtor is secured in these rights against sale under execution founded on a judgment obtained in any state or federal court on any debts contracted since the adoption of the state consti-

tution, except for taxes and the purchase money of land claimed as a homestead. I am inclined to think that this constitutional provision was intended to apply only to debts arising in the relation of individual debtor and creditor, and did not contemplate debts due to the state or the United States.

I am not aware of any decision of the state supreme court upon this subject, and I will not express a decided opinion as to how far these constitutional exemptions apply to debts due to the state. I fully recognize the doctrine that the federal courts are bound to accept as correct the decisions of the state courts upon all questions arising under the state constitution and laws, when no question of national rights and authority is involved.

In the course of my argument I feel that I can with propriety express the inclination of my opinion, as, from observation and experience, I am familiar with the history of the situation, condition, and feelings of the people of the state, and the purposes they had in view at the time they formed and adopted the state constitution of 1868. They had just emerged from a disastrous civil war, which had resulted in the loss of most of their property, and they were greatly embarrassed by indebtedness to individual creditors, and they desired to secure their homestead and household effects, which were to them necessities of life, from the ruinous consequences of sale under execution. Previous to the adoption of the constitution various statutes had been passed by the legislature of the state to stay proceedings in the courts, and to postpone sales of property under executions upon judgments which had been or might be obtained.

In interpreting and construing this article of the constitution I think that I can make the reasonable inference that the intent of the people, in the exercise of their rights of sovereignty in framing their organic laws, was permanently to secure their homes and the necessities of life against the eager grasp of individual creditors. This intent is made still more manifest by the uniform course of subsequent legislation upon this subject, as legislative action is generally an index of popular feeling and sentiment. There is a striking analogy and generally an entire harmony between the rules of interpretation of constitutions and those of statutes. The first and fundamental rule in relation to the interpretation of all instruments applies to a constitution; that is, to construe them according to the sense of the terms and the intention of the parties. Potter's Dwaris, 655.

In considering the language of the constitution, the condition of

the country at the time when adopted, and the various circumstances which clearly indicate public sentiment, I am strongly inclined to the opinion that the exemption provisions do not, and were not intended to, apply to debts due the state or the United States. But, independent of these rules of interpretation and construction which related to the *intent* of the framers of the constitution, there is an old and well-established rule of law that governs this question. When general words are used in a statute they do not include the government, or affect its rights, unless such intention is made clear and indisputable by express words in the statute. This doctrine is fully announced and acted upon by the supreme court, in considering the rights of the United States under the bankrupt act, in the case of *U. S. v. Herron*, 20 Wall. 251.

There are other well-settled principles of law, which, I think, are conclusive upon this subject. The state constitution extends to all the subjects of government within its territorial limits, except those which have been ceded to the supreme and exclusive control of the national government. "The sovereignty of the United States and of the several states are distinct and independent of each other within their respective spheres of action, though both exist within the same territorial limits." The national government, though limited as to its objects, is supreme as to those objects, and any state law in conflict with the rights and powers of the national government is inoperative to the extent of such interference. The national government, in the exercise of its legitimate powers, has devised and adopted a system of internal revenue, and no state convention or legislature can impede and obstruct the free course and accomplishment of those measures, as they are essential to the important objects for which the national government was established. *Bank of Commerce v. N. Y. City*, 2 Black, 620.

The principles of law upon this subject are well settled, and need no further statement or discussion. I think I may state as correct the general proposition that state exemption laws cannot apply to any debt, obligation, duty, or liability due from a citizen to the United States. Exemption laws are generally prompted by a spirit of generosity and humanity, and when confined to reasonable limits I regard them as establishing a wise and beneficent public policy in securing to unfortunate debtors and their families the necessities of life, and thus in some degree enabling them to follow the pursuits of industry which are necessary to the existence and well-being of every community. Most of the states have adopted this wise and human

policy, which is in accordance with the liberal and enlightened spirit of the age.

In section 3187 of the Revised Statutes provision is made for exempting certain property from distraint for internal-revenue taxes, and I think that these exemptions might well be extended to all the debts due the United States upon collections made under execution; but this is a matter for the consideration and action of congress, and not for judicial liberality, as the courts must construe and enforce the law as it is written.

The district attorney may draw the order requested in his motion.

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BERRIAN *v.* CHETWOOD.\*

(*Circuit Court, S. D. New York.* December 14, 1881.)

1. REMOVAL OF CAUSE AFTER DEFAULT IN PLEADING.

Where the petition for removal was presented after defendant's time to answer had expired, and he was in default, *held*, that there was no controversy between him and plaintiff, within the meaning of the statute, so as to make a case for removal.

Motion to Remand.

BLATCHFORD, C. J. Even conceding that there were proper written extensions of time to answer till November 1st, nothing that then or before or afterwards occurred in oral conversation between the attorneys amounted to a consent by the plaintiff's attorney to extend the time to answer beyond November 1st. So, on November 3d, when the petition for removal was presented and the bond approved, the defendant's time to answer had expired, he was in default, and there was no controversy between him and the plaintiff, within the meaning of the statute, so as to make a case for removal.

The motion to remand the cause is granted, with costs.

\*Reported by S. Nelson White, Esq., of the New York bar.

## LEATHERS v. AIKEN, Adm'x.\*

(Circuit Court, E. D. Louisiana. December 21, 1881.)

## 1. CONSTITUTIONAL LAW—WHARFAGE TAX—PROHIBITION ON MUNICIPAL CORPORATIONS.

A municipal corporation cannot exact a charge upon vessels for entering or leaving a port, or remaining therein, nor levy a tax on vessels and water-craft entering its port, and using the wharves and landings, for the general revenue of such corporation.

*Cannon v. New Orleans*, 20 Wall. 577.

*Packet Company v. Keokuk*, 95 U. S. 80.

## 2. SAME—SAME—POWER OF MUNICIPAL CORPORATION.

A municipal corporation, owning improved wharves and other artificial means, which it maintains at its own cost, for the benefit of those engaged in commerce upon the public navigable waters of the United States, may charge and collect, from parties using its wharves, such reasonable fee as will fairly remunerate it for the use of its property.

*Packet Company v. St. Louis*, 100 U. S. 423.

*Vicksburgh v. Tobin*, Id. 430

In Equity.

*Chas. S. Rice*, for complainant.

*W. S. Benedict and Geo. Denegre*, for defendant.

PARDEE, C. J. This case has been submitted on the bill, answer, and affidavits, and under a rule *nisi*, to determine whether an injunction, pending the suit, should issue. The evidence and arguments offered cover a very wide range, but the facts it is necessary to consider in reaching a decision can be succinctly stated as follows:

(1) The complainant is the owner and manager of certain steam-boats, making weekly trips to the port of New Orleans, landing, tying up, loading, and unloading at the artificial wharves and levees belonging to said city.

(2) The city of New Orleans, by ordinance and contract, has fixed the rate of charges for the use of the wharves and levees according to the tonnage of the steam-boats using them, and has farmed out to the defendant, Aiken, the revenues derived therefrom for all the space lying in front of the first, second, third, and fourth municipal districts of the city, excepting therefrom such portions as have been leased or granted to other parties for private or exclusive use—this exception covering over one-fourth of the front of said four districts.

(3) The defendant, Aiken, in consideration of this grant, undertakes to keep all of said wharves and levees—except private or exclusive wharves—in good condition, making repairs according to certain specifications, to build certain new wharves and bulk-heads when ordered, also, according to specifications, to light the whole front of said districts with the electric light, and, in addition, to pay to the city of New Orleans, in monthly instalments, \$40,000 per year, \$30,000 of which is to be devoted to the payment and maintenance of a harbor

\*Reported by J. P. Hornor, Esq., of the New Orleans bar.

police for the protection of commerce, etc., along the river front of the city, and the remaining \$10,000 to be set apart and devoted exclusively to the payment of the salaries of wharfingers, collection clerks, signal officers, and other employes on levees in connection with the department of commerce of said city; and many other minor matters and stipulations are provided for and agreed to.

(4) The total cost of the wharves and landings to the city of New Orleans, December 31, 1874, and for which its bonds were outstanding, was \$1,044,000, and up to May 1, 1875, the city had expended for wharves and landings, in excess of all receipts for use thereof, \$836,635. During the lease to Eager, Ellerman & Co., from July 1, 1876, to May 29, 1881, the said indebtedness was liquidated and paid at reduced rates, and the wharves kept in certain repair, from the revenues, which, at the rates then fixed, yielded about \$230,000 annually. The rates fixed by the contract with defendant are the same as in the contract with Eager, Ellerman & Co., except a decided reduction on ocean vessels, and a promised reduction on all shipping of 10 per cent. during the third year, and 20 per cent. during the fourth and fifth years of the contract; and under this contract the revenues will be about \$200,000 per year.

(5) The nature of the climate, and the currents and banks of the river in front of the city of New Orleans, necessarily render all wharves and levees perishable, requiring for them constant rebuilding and repairing.

The complainant attacks this lease or contract to defendant as being in violation of the constitution of the United States, to-wit: Article 1, § 10, forbidding any state, without consent of congress, from laying any duty on tonnage. Article 1, § 8, granting to congress the power and authority to regulate commerce with foreign nations and among the several states and with the Indian tribes. Article 1, § 10, forbidding any state, without the consent of congress, to lay any import or export duties, except what may be absolutely necessary for executing its inspection laws. Article 1, § 9, no tax or duty shall be laid on articles exported from any state.

He also attacks it as being in violation of the act of congress, approved April 8, 1812, admitting Louisiana into the Union.

He further claims that the rates of wharfage charges or dues under the lease and ordinance are excessive and unjust, nearly double the amount required to keep the wharves in repair and make such new constructions as the needs of commerce may require, and that the charges and dues authorized by the lease and ordinance amount really to a disguised tax or duty on tonnage for the purpose of maintaining electric lights, a police force on the levees, and one department of the city government, all of which, if required at all, should be supported by the general public, and not burdened on commerce.

Such being the substantial facts and the allegations of the bill, raising a question under the constitution of the United States, there can be no doubt of the jurisdiction of the court.

The case may be further simplified by leaving out of consideration the circumstances attendant upon the advertisement and adjudication of the contract or lease, the matter before this court being in essence

the same as though the defendant, Aiken, were not interposed, and the city of New Orleans, through its council, had simply passed an ordinance fixing the rate of wharfage dues, and directed in the same ordinance the disposition of the fund collected.

And now we have only to determine whether such an ordinance, with the rates as fixed, is obnoxious to the constitution and laws of the United States.

The authorities so fully cited in this case show exactly what a municipal corporation may exact from ships and water-craft landing at the wharves and landings constructed or owned by the corporation for the use and accommodation of such ships and water-craft. It cannot exact a charge for entering or leaving the port, or remaining therein. *Cannon v. New Orleans*, 20 Wall. 577; *Alexander v. Railroad Co.* 3 Strobbart, 594. It cannot levy a tax on vessels and water-craft entering its port and using the wharves and landings, for the benefit of the general revenue of such corporation. *Packet Co. v. Keokuk*, 95 U. S. 80; *Packet Co. v. St. Louis*, 4 Dill. 10. But a municipal corporation owning improved wharves and other artificial means, which it maintains at its own cost for the benefit of those engaged in commerce upon the public navigable waters of the United States, may charge and collect from parties using its wharves such reasonable fees as will fairly remunerate it for the use of its property. *Packet Co. v. St. Louis*, 100 U. S. 423; *Vicksburg v. Tobin*, Id. 430; *Packet Co. v. Keokuk*, *supra*; *Cannon v. New Orleans*, *supra*; *Packet Co. v. St. Louis*, *supra*.

That such fees are regulated by the tonnage of the vessel will not constitute them a tonnage tax in the meaning of paragraph 3, § 10, of art. 1, constitution of the United States. *Packet Co. v. Keokuk*, *supra*; *Johnson v. Drummond*, 20 Gratt. 419.

From these propositions, so well sustained by authority, the following are legitimate corollaries:

No charges can be made on vessels landing at wharves of a municipal corporation for facilities not furnished.

The commerce of this year cannot be taxed to furnish facilities for the next year.

It is immaterial what disposition is made of the funds collected, except as showing what the collection is based on.

No charges can be made on the promise to furnish facilities to commerce.

Applying these propositions and principles to the case under consideration, what do we find? The complainant, with his boats, uses the wharves and levees, between Girod and St. Louis streets, on the

river front of the city of New Orleans, where the same are in undisputed good order and repair. By the ordinance he is required to pay for this use 10 cents per ton of his boats for each landing. Is this a reasonable charge for the accommodations furnished? If it is reasonable it is no tax on commerce, no matter what may be done with the moneys so collected. The complainant cannot litigate for the rights of others. If wharves other than those used by complainant are in bad order, it is no concern of complainant, except as he may be a public-spirited citizen.

It is shown that complainant uses the best and most eligible wharves in the city front, and that the rates as applied to those particular wharves are very low, the complainant having offered the city, for the exclusive use of those wharves, to pay the rates and yet build and maintain them at his own cost. But to determine whether this charge against complainant is reasonable, regard must be had to the whole system of wharves and levees for the city, as no just result can be obtained by taking any one favored point and basing the issue upon that.

The evidence offered herein shows that the total cost of the wharves now existing is largely over \$1,000,000; that by reason of the climate, the nature of the banks, and the uncertain currents of the river, constant watching and repairing and rebuilding are necessary; that by the rates as fixed in the present ordinance the revenues will amount to about \$200,000 per year, or about one-fifth of the total cost of the constructions; that the present charges are and are to be a little less than the charges were for the five years preceding this present rate, and that in the course of years the rates have been reduced 50 per cent. on the class of boats used by complainant, and it seems the rates compare favorably with those of other cities on the river. Now, under this showing, this court cannot say that these rates are not reasonable, bearing in mind that just and reasonable compensation for the use of property must be something more than the mere sum necessary to keep the property in repair.

As I have shown that the complainant has no legal concern as to how the reasonable compensation he pays for the use of wharves is expended, it is not really necessary to consider the charge that the defendant's contract and lease is an attempt to levy a tonnage tax, under the guise of wharfage dues, to support a harbor police, pay wharfingers, etc., and maintain an electric-light system on the wharves. However, I will say that every one interested in the wel-



fare of New Orleans—which city is so dependent on commerce—should be gratified to find that the money that the city has the legal right to exact from commerce for facilities furnished is to be devoted to the furnishing of still further facilities and increased protection. There can be no doubt that on such a busy levee as that of New Orleans, wharfingers, signal officers, etc., and a police force, are necessary for the benefit of commerce, and without which all would be turmoil and confusion.

As for the electric-light system, while opinions may vary as to its success and usefulness, the city has a right to try it in place of other lights, and it is to be hoped the experiment will be successful. That the complainant does not load or unload at the wharves at night, and therefore does not want any light there, can furnish no rule as to other parties who may desire to use the wharves at night. That the whole levee is to be lighted, and perhaps the river and city get a share, is also a vain objection.

Under the conclusions reached, the application for injunction must be denied, and the outstanding restraining order be dissolved. And it is so ordered.

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WILKINSON, Assignee, etc., v. TILDEN.\*

(Circuit Court, S. D. New York. November 3, 1881.)

1. PARTNERSHIP—ACCOUNTING.

An accounting between partners cannot be had on affidavits on an interlocutory motion, but must be had in the orderly progress of a suit.

2. SAME—INJUNCTION.

A temporary injunction may be granted, pending a suit for an accounting, to prevent one partner by a sale of the partnership property from changing the *status* of the other partners in respect to it, where the injury resulting from such sale could not be remedied.

*U. S. v. Duluth*, 1 Dill. 469, 474, cited and approved.

In Equity.

*G. Bliss* and *R. M. Sherman*, for plaintiff.

*F. N. Bangs* and *F. E. Smith*, for defendant.

BLATCHFORD, C. J. On all the papers before me I do not think it can be said that there was not a partnership between Wetmore and the defendant which continued until the interest of Wetmore passed to the plaintiff, or that there is not a subsisting relation between the

\*Reported by S. Nelson White, Esq., of the New York bar.

plaintiff and the defendant, on the basis of which partnership and which relation the plaintiff can maintain this suit to obtain an accounting by the defendant as to his dealings and transactions respecting the property in question from the commencement. The bill prays for such an accounting. It cannot be had on affidavits, or an interlocutory motion. It must be had in the orderly progress of a suit. I am not prepared to hold now that the suit is barred by the two years' statute of limitations. On the foregoing basis, the case made by the bill is not satisfactorily refuted by the defendant. If the threatened sale of stock takes place, the injury to result to the plaintiff from the sale cannot be remedied. In such a case a temporary injunction is granted. *U. S. v. Duluth*, 1 Dillon, 469, 474. The defendant has in his hands the mine and all the property, and the effect of the injunction is only to prevent him from changing the status of the plaintiff in respect to the property while the suit is pending. The injunction contained in the order of May 31, 1881, will be continued.

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### UNITED STATES *v.* MILLS.

(Circuit Court, W. D. Wisconsin. 1881.)

#### 1. GOVERNMENT LANDS—INNOCENT TRESPASSER.

It is a good defence to an action of trover against an innocent trespasser upon government lands, for the value of timber cut by him therefrom, that he afterwards entered the land from the government, paid the price therefor and the costs up to the time of entry.

#### 2. MEASURE OF DAMAGES.

When a wilful trespasser cuts and removes timber and converts it into logs, ties, or piles, the measure of damages is the market value of the latter, in cash, at the time and place of their sale and delivery, and not the value of the stumpage merely.

This was an action of trover brought in the above court by the United States against the defendant to recover the value of a quantity of pine timber alleged to have been cut and removed from lands of the United States by the defendant. The case was tried at the special December term, 1881, of said court, at Madison, before *Bunn*, D. J., and a jury,

*H. M. Lewis*, U. S. Atty., and *J. M. Bingham*, for the United States.

*E. E. Bryant* and *J. M. Morrow*, for defendant.

BUNN, D. J., (*charging jury.*) The questions of law in this case are quite simple, and, for the most part, have already been decided by the court. All the questions of difficulty are questions of fact, which are for the jury. So that the burden and responsibility of a proper and judicious determination of the case rests with you. The first question to which your attention will be called is, has the defendant, Mills, cut and carried away, and converted to his own use, timber from government lands in the manner charged? If he has, then your verdict should be against him, unless such cutting was wholly done, without knowledge or fault of defendant, upon lands which he afterwards entered and paid for.

There are two pieces of government land upon which the defendant acknowledges he cut timber. But he alleges and swears that he did it under the belief that he had a right to cut, because he owned the land. The N.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of section 4, township 20, range 2 W., he admits cutting the timber from. It is in evidence that he afterwards entered this land from the government and paid the price, and, so far as this 80 acres is concerned, you will determine from the evidence whether, at the time he cut the timber, he supposed he had entered the land as he testifies, and that he took away the timber under that belief, and without fault or knowledge on his part that the land belonged to the United States. If you find in his favor on this question, then, under the law of congress,—act of June 15, 1880, (21 St. at Large, 237.)—having entered the land and paid the costs up to the time of the entry, he is excused from any liability for the trespass, and no verdict should be found against him therefor. The same principle and same instruction are applicable to the tie-cutting on the N. W. N. W. section 22, where defendant admits the cutting, but swears that he supposed he had the right to cut it under a purchase from Van Tassel, and when he found it belonged to the government he entered it and paid for the land. On these two descriptions you will find specially, as to each piece, whether the cutting was done innocently under the belief that defendant had the right to cut.

If you find against the defendant on these questions, then, however your finding may be upon the rest of the case where the cutting is controverted, your verdict will be against the defendant for the value of the logs and ties cut and converted from these descriptions.

As regards the other lands in controversy, the cutting and conversion of the timber is disputed by the defendant, and it will become

your serious duty to determine, from the mass of evidence in the case, whether the defendant is guilty of such cutting and conversion or not. The court cannot aid you in your finding upon this question. It is one wholly of fact, to be found from the weight of evidence. The question will be, what do you believe from the evidence taken as a whole? How are you fairly convinced from the testimony? The evidence is apparently conflicting. Whether it be so or not is for you to determine. If you find it conflicting it will be your duty to reconcile it if you can. If not, then it will be your duty to determine as to what part of it you will give most credit. And this question is not an arbitrary one, or to be solved by any technical rules, but is one resting in the sound discretion of the jury. You are to judge from all the circumstances in evidence, and developed on the trial, the weight to be given to the testimony of each witness. You have heard the witnesses testify, have observed their manner on the stand, have noticed their bearing and disposition or inclination to state the truth or color it. You have observed their bias, if any, their interest, their means of knowledge in reference to the things of which they are called to speak, their power of recollection, the consistency or inconsistency of their statements, and how they are corroborated and sustained or contradicted by other testimony, or by the conceded facts in the case. It is from these circumstances, and all others bearing on the question, that you are to determine what witnesses are entitled to most credit, and the weight to be given to the statements of each and all.

Evidence is that which satisfies and convinces the mind in regard to the real truth of the matters in issue; and if the statements of a witness have not this convincing quality the jury is entitled to withhold from them credit. In fact, they cannot help doing so, because the giving or withholding credence to the statements of another, whether under oath or not, is not a matter of will or choice. The jury are convinced by what is fitted from its nature to convince,—that is, by that which illustrates and elucidates the truth,—and the truth is ever the final object of your investigations; but, of course, you are to determine the truth from the evidence given on the trial, not from that which you may conceive might have been given.

It is claimed, and it may be true, that the government has labored under disadvantage in having to call witnesses that have been more or less identified with the defendant or under his influence, and when they come upon the stand are what are called "slow" witnesses for the party calling them. All I desire to say in regard to this is what

I have already said in general: you are to try the case on the evidence before you, not upon what you might suppose the witnesses could have testified if they would. You cannot presume that the witnesses might have sworn to more than they have sworn to.

It devolves on the prosecution to satisfy you by at least a fair preponderance in the weight of the testimony both as to the *fact of the cutting and the amount*. If you are not satisfied from the testimony as to the fact of cutting, your verdict should be for the defendant. If you are so satisfied, the remaining question will be as the extent of the cutting and value. And this you will determine in the same manner from the weight of evidence on that point.

You will use your best judgment upon the testimony, and say what your conclusion is—how you are convinced. You cannot presume that the defendant has cut and converted more than the evidence shows he has. On the contrary, if the evidence shows to your satisfaction that defendant is guilty, you cannot excuse him from the consequences of his own acts because the evidence also shows that others have trespassed on the same lands who have not been prosecuted or had justice meted out to them. "What's open made to justice that justice seizes." That is to say, when the guilt of the person charged is made apparent, he cannot be excused because others who are not charged have done the like and go unpunished.

It may be quite evident from the testimony that other persons have trespassed in former years upon the lands in question. With that *you* have nothing to do except to determine whether the cutting, or some part of it, charged upon the defendant, was really done by him or was done by these other persons. The defendant's evidence tends to show that it was all cut in former years by other trespassers. You must determine the facts. If you find that the defendant did cut and convert timber, as charged, the amount of damages he will be chargeable with is the value of the logs, ties, piles, or wood which he converted at the time and place of its sale and conversion by him.

The government is not confined in its measure of damages to the value of the stumpage; that is, the value of the timber in the standing tree. On the contrary, as the defendant could get no title to the timber by converting it into these things, but the logs, ties, or piles, after being cut, still belonged to the government, and might be seized and held by the government, the defendant will be chargeable with the market value in cash at the time and place of their sale and delivery.

You are instructed to find a general verdict, and if this is for the plaintiff you will assess and find the damages the plaintiff will in such case be entitled to recover.

You will also, according to a form of verdict which the court will hand you, find specially upon each of the tracts of land where cutting is charged, though you will not be required to find separately the amount cut and converted from each, but simply *whether or not the defendant has cut and converted*.

You will also find specially, as directed, whether the cutting upon N.  $\frac{1}{2}$  S. E.  $\frac{1}{4}$  and N. W. N. W. 22 was in good faith, under the belief that defendant had the right from being the owner to so cut.

Gentlemen, the further responsibility of the case lies with you. I am glad to know that you have given the utmost heed to the testimony, and to the discussion of it by counsel. It only remains for you to give the case such further consideration as its nature and importance to the parties demand, and render a verdict which shall do justice according to the law and evidence.

Verdict for the plaintiff, \$2,000.

*Bly v. U. S.* 4 Dill. 464, *accord*.

See *Single v. Schneider*, 30 Wis. 570.

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#### LESZYNSKY v. MERRITT.\*

(*Circuit Court, S. D. New York. November 2, 1881.*)

##### 1. ATTORNEY—COMPENSATION FOR SERVICES—LIEN.

*Prima facie* an attorney has a lien for compensation on the papers in his hands where he has rendered some services.

##### 2. SAME—SUIT FOR COMPENSATION—CONTRACT.

The question whether there was such a contract between an attorney and his client that the former, having given up his employment, has no claim to be compensated, must be determined in a suit brought by the attorney to recover the compensation, the lien remaining *in statu quo* meanwhile. If suit be not brought within a limited time and diligently prosecuted, the court will order the papers to be given up.

##### 2. SAME—SAME—SAME.

Except by consent such a question cannot be determined by the court in a summary way.

*In re Paschal*, 10 Wall. 433, cited and followed.

C. G. Patterson, for the motion.

R. M. Sherman, opposed.

\*Reported by S. Nelson White, Esq., of the New York bar.

BLATCHFORD, C. J. The clients and the attorney appear to be at issue, in good faith, on the matters which lie at the foundation of the contract for service. If the view of the clients is the true one, on the facts, nothing is due to the attorney. If his view of the facts is the correct one, something is due to him on a *quantum meruit*. *Prima facie* he has a lien for compensation on the papers in his hands because he rendered some services, and if there was such a contract, that, having given up the employment, he has no claim to be compensated, that ought to be made out. Except by consent, the question in dispute cannot be determined by the court in a summary way. It must be left to be determined in a suit to be brought by the attorney to recover the compensation; the lien, if any, remaining *in statu quo* meanwhile. If such suit be not brought within a time to be limited, or be not then diligently prosecuted, this court would order the papers to be given up. The order of June 28, 1881, ought to be vacated. The foregoing views are in accordance with the principles laid down *In re Paschal*, 10 Wall. 483.

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UNITED STATES v. BUCHANAN.

(District Court, W. D. North Carolina. November Term, 1881.)

1. STATUTES.

Highly penal statutes are to be strictly construed.

2. SAME.

A statute is to be construed so as to carry out, with reason and discretion, the intent of the legislature, though such construction may seem contrary to the letter of the statute.

3. MASTER AND SERVANT—CRIMINAL LIABILITY OF THE MASTER.

Where a master, owing a duty to the public, entrusts its performance to a servant, he is responsible criminally for the failure of his servant to discharge that duty, if its non-performance is a crime.

4. CRIMES—REV. ST. § 3324—EFFACING STAMPS FROM EMPTY CASKS.

An indictment, under section 3324 of the Revised Statutes, for a failure to efface a stamp from an empty cask which had contained distilled spirits, cannot be sustained, though the proof shows that the cask had been emptied so far as it could be done by the faucet, if there is proof of the additional fact that it had been removed, with the stamp still on it, from the place where it had been used in the course of business with intent to pour the spirits still remaining in it out of the bung-hole as soon as the necessary assistance could be procured for that purpose, and the delay is within reasonable time.

This was an indictment, under section 3324 of the Revised Statutes, for a failure to efface a stamp from an empty cask which had contained distilled spirits. The defendant was a duly-licensed retail dealer of distilled spirits.

The business was carried on in a small room in his dwelling, and was under the exclusive control of his wife. She kept the key of the room, and never allowed her husband, who was an intemperate man, to enter except when she was present. A deputy collector, while on a visit of inspection, discovered a cask which was duly stamped and had contained distilled spirits. The witnesses for the prosecution stated that the cask was entirely empty. Witnesses on the part of the defence stated that the cask was not entirely empty, but still contained about a pint or quart of spirits. The witnesses for the prosecution also stated that the wife of defendant was present at the time of inspection, and admitted that the cask was empty. The witnesses for the defence stated that the wife said, at the time, that she had emptied the cask that day as far as she could by the faucet, and had turned the cask up on the head so that she might procure assistance to draw off the entire contents through the bung-hole. The defendant was not present, and never had anything to do with carrying on the business except permitting the use of his house and allowing his name in procuring the license.

*James E. Boyd*, Dist. Atty., for the United States.

*J. W. Bowman* and *J. W. McElroy*, for defendant.

DICK, D. J., (*charging jury*.) It is conceded that the stamp on the cask was not effaced and obliterated as required by law. The only controverted question of fact which you have to determine is, was the cask empty when discovered by the deputy collector? The affirmative allegation is made in the indictment, and is material in constituting the offence charged; and, before a conviction can properly be had, you must be satisfied from all the evidence, beyond a reasonable doubt, that the allegation is true.

As the statute upon which this indictment is founded is highly penal, a general rule of construction requires that it shall be strictly construed, and not extended by implication. The words in a statute, if of common use, are to be taken in their natural, plain, obvious, and ordinary meaning. The offence charged in this case is a failure to efface and obliterate a stamp "at the time of emptying such cask," etc. You will consider what is meant by the words "emptying such cask." The ordinary signification of the verb "to empty" is to "make void;" "to exhaust;" "to deprive of the contents." If this ordinary signification of the word used in the statute is adopted, the defendant cannot be convicted unless the evidence shows that the cask was completely deprived of its contents—not a pint left. I am not disposed to adopt this strict literal construction, as there is another important rule in the construction of statutes which must be observed. We must consider the object and spirit of the statute, and try to ascertain, from the language of the whole and every part of the statute, what was the intent and purpose of the legislature in making the statute. The



intent of the legislature may be found in the statute itself, and from other statutes *in pari materia*; and also by considering the probable effects and consequences that would result from a strict literal construction. When ascertained, this intent should be followed with reason and discretion, though such construction may seem contrary to the letter of the statute; for it is the intent which often gives meaning to words otherwise obscure and doubtful. The evident intent of the legislature was to guard against frauds on the internal revenue by preventing the re-use of stamped casks which had once been emptied; and there was a great and manifest necessity to provide against frauds which could so easily be perpetrated. I am inclined to the opinion that when a retail dealer of distilled spirits draws off the contents of a cask as far as can be done from the faucet, and then removes it from the place where it had been used in his business, he should completely exhaust the cask, if he so desires, and efface and obliterate the stamp. If the law allows a retail dealer to empty a cask as far as can conveniently be done by the ordinary method, and then remove it from the place where used in the course of his business, and not efface and obliterate the stamp, because it still contains a small quantity of distilled spirits of little value, then the penalty of the law can easily be evaded, and the purpose of the legislature be frustrated.

I am also inclined to the opinion that the words "at the time of emptying such cask" ought not to receive such a strict construction as to require the effacing and obliterating of the stamp to be done *eo instanti* that the cask is emptied; but the act ought to be done in a convenient time, considering the surrounding circumstances affording evidence of reasonable excuse for delay.

If you should be satisfied from the evidence that the wife of the defendant, on the morning of the day when the cask was discovered, had emptied the cask as far as could be done by the faucet, and had removed it from the place where it had been used in the course of business, and had failed to efface and obliterate the stamp because she regarded the cask as still containing distilled spirits of value, which she desired to save, when she could procure the necessary assistance to pour it out of the bung-hole, then I charge you that there was reasonable cause for delay, and the defendant is entitled to a verdict.

If, however, you become fully satisfied from the evidence that the cask was entirely empty at the time it was discovered by the deputy collector, or that it contained a small quantity of spirits of little value,

and there was no reasonable cause for the delay in effacing and obliterating the stamp, then you ought to return a verdict of guilty.

The counsel for the defendant insisted that even if the jury should be fully satisfied that there was a violation of law, the defendant is not guilty, as the offence was committed by his wife in his absence, and without his knowledge and consent. As a general rule, the husband is not criminally liable for offences committed by the wife in his absence, and without his consent or procurement. If he is present with his wife, and participates in the crime, he may be indicted. In most cases of felony, but not in misdemeanors, where the husband is actually or constructively present at the time of the commission of a crime, the wife may be excused, although she participated, on the ground of the actual or presumed command and coercion of the husband compelling her to the commission of the crime. But this is only a presumption of law, and may be rebutted by evidence showing that she was not acting under compulsion, but was a voluntary and principal actor.

The rules of law as to the joint and separate liability of a husband and wife in the commission of crime do not govern this case, and they are only referred to as they were strongly insisted on in the argument of counsel. This is not a crime of commission, but the offence consists in a failure to perform a legal duty. The emptying of the cask was not criminal,—the failure to efface the stamp is the gist of the offence.

The defendant had undertaken a public business under a license from the government, and his wife was his agent in carrying on this business, and she omitted to perform a duty imposed by law upon persons engaged in such licensed employment.

As a general rule, a criminal act of a servant or agent does not subject the master or employer to any criminal responsibility, unless he directed or co-operated in such act, or the employment necessarily resulted in such unlawful act. It is, however, well settled that where a master, owing a certain duty to the public, entrusts its performance to a servant, he is responsible criminally for the failure of his servant to discharge that duty, if the non-performance of such duty is a crime.

The wife in this case was the agent of her husband, and he is criminally responsible, if, without reasonable justification and excuse, she failed to perform the duty imposed upon him by the law.

There is some direct conflict between the testimony of the witnesses

upon the material points in this case, which cannot be easily reconciled. The good characters of all the witnesses have been shown by the testimony of their acquaintances. In judging of the credibility of the witnesses, you should consider the motives by which they are influenced, and the manner in which they conducted themselves on the examination before you. You cannot decide the case upon the preponderance of testimony, as juries can do in civil cases. The presumption of innocence which the law throws around a person on trial for crime remains with and protects him until the government, by the whole evidence, satisfies a jury, beyond a reasonable doubt, that he is guilty in the manner and form as charged in the indictment.

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## RALPH v. UNITED STATES.

(Circuit Court, N. D. Illinois. December 5, 1881.)

## 1. CRIMES—PERJURY—MATCH-STAMP BOND—AFFIDAVIT OF SURETY.

The affidavit required by the regulations of the treasury department to be made by a surety upon an ordinary match-stamp bond, to secure the payment due to the United States for internal revenue stamps to be delivered on credit to a manufacturer of matches, setting forth the pecuniary responsibility of the surety, is an instrument authorized by law; and if statements made therein as to his pecuniary responsibility are false to his knowledge, the surety is guilty of perjury.

On Error to the District Court.

*Bisbee & Ahrens*, for plaintiff in error.

*J. B. Leake*, Dist. Atty., for the United States.

DRUMMOND, C. J., (*orally*.) Under the provisions of the internal revenue laws of the United States, one Phineas Ayer, in December, 1878, procured a bond with sureties in the sum of \$30,000, being an ordinary match-stamp bond, in the form then required by the commissioner of internal revenue, to secure the payment due to the United States for certain internal revenue stamps, to be delivered to Ayer on credit as a manufacturer of matches. As a necessary condition to the acceptance of this bond and of the sureties, the regulations of the treasury department required that an affidavit of the surety should be made before some officer qualified to administer an oath, signed by the surety, and setting forth his pecuniary responsibility. Such an affidavit was signed by the plaintiff in error and by his wife, Matilda S. Ralph in this case, before a proper officer. The indictment charges that the plaintiff in error procured his wife to sign the affidavit, and that she committed perjury in signing it. Before the

district attorney approved the bond he examined the plaintiff in error and his wife particularly in regard to their property, real and personal. After the bond was executed and the affidavit was sworn to and signed, it was approved by the district attorney of the United States, and was subsequently accepted by the proper officer of the treasury, and revenue stamps to a large amount were issued to Ayer. On the trial of the case before the district court the affidavit was offered in evidence, and objection was made on the ground that it was not an instrument required by law to be sworn to, and that therefore a false statement contained therein did not constitute perjury. This objection was overruled by the court, to which exception was taken. It was also shown that the plaintiff in error admitted that he was not pecuniarily responsible, but that his wife was responsible as surety, they both having signed the bond. There was evidence also offered tending to show that the statement set forth in the affidavit sworn to by the wife of the plaintiff in error was false as to the value of the real property therein described and as to the title thereto. The plaintiff in error admitted on the trial, by his counsel, that he procured his wife to sign the bond, and that he was responsible for whatever she had done, but denied that she had committed perjury. The counsel of the plaintiff in error, addressing the court, said, in his presence and hearing, "The defendant consents that a verdict of guilty may be rendered by the jury," and the court thereupon said, "Does the defendant so consent?" No objection was made, and the plaintiff in error nodded his head in reply to the question of the court, and a verdict of guilty was then directed to be rendered by the jury, which was accordingly done in the presence and hearing of the plaintiff in error, without objection or dissent by him.

After the recording of the verdict, a motion was made by the plaintiff in error for a new trial, and several affidavits were filed in support thereof, the principal object of which was, apparently, to show that the declaration of the counsel that a verdict of guilty might be rendered was unauthorized, and that there were several witnesses present whose testimony the plaintiff in error desired to introduce to show that the statements contained in the affidavit were true, and that his counsel was unwilling and declined to call the witnesses and introduce their testimony, relying upon the proposition that the affidavit was not an instrument authorized by law, and therefore perjury could not be assigned upon it. It will be seen, therefore, that after the introduction of certain evidence, further evidence was waived, and an admission made by the counsel, in the presence and hearing of the

plaintiff in error, of his guilt under the indictment, and a verdict of guilty by the jury was rendered and recorded, as it would seem, with his consent, openly given in court. The motion for a new trial was addressed to the discretion of the court, and no error, therefore, for overruling it can be assigned. The district court had the best opportunity of judging of the effect of the affidavits which were filed in support of the motion. It had heard the testimony of all the witnesses on the trial. It had observed the conduct and demeanor of the plaintiff in error during the trial. It was, therefore, better able to judge of the truth of the statements made in the affidavits than this court, and the rule, which has been established by the supreme court of the United States applies here, that the opinion of the court upon a motion for a new trial is a matter of discretion and not error. It is claimed by the plaintiff in error that his rights were sacrificed by the action of his counsel in the district court. Of that the district court was a competent judge, and it is to be observed that the counsel himself, who acted for the plaintiff in error in the district court, was not heard, and his affidavit was not taken, and therefore his statement of the facts, and of the circumstances which operated upon him, is not before us. He is said to have relied upon a view which he took of the law of the case which he thought conclusive, namely, that there was no statute which required an affidavit of the kind which is the subject of controversy in this case. If that were so, then it was a misapprehension, we think, of the law which declares that certain officers of the treasury department, as well as the secretary himself, may make certain rules and regulations relating to the duties of their several offices. There can be no doubt it was competent for a regulation of the kind in controversy here to be made by the proper officer of the treasury, namely, that before a bond should be accepted, which might authorize the delivery, under the law then in force, of stamps on credit to a manufacturer of matches, an affidavit should be made showing the responsibility of the sureties, and therefore this was an affidavit authorized by law; and if the statements contained in it were false, and known to be so by the person making them, then upon it perjury could be assigned. The judgment and sentence of the district court will be affirmed.

## ROYER v. RUSSELL &amp; Co.

(Circuit Court, N. D. Ohio, E. D. November 26, 1881.)

1. LETTERS PATENT—DESTRUCTION OF MODEL—MISTAKE IN DRAWING—MEASURE OF PROOF.

Where the original model which was filed in the patent-office has been destroyed, the fact that a mistake has been made in the drawings on file, on which the patent was issued, must be very clearly established before the court will allow them to be corrected.

2. SAME—GRAIN SEPARATORS.

Letters patent No. 167,570, granted September 7, 1875, to complainant, for an improvement in grain separators, are not infringed by the defendants' machine.

In Equity.

*Lucien Hill* and *Chas. M. Peck*, for complainant.

*M. D. Leggett & Co.*, for defendants.

WELKER, D. J. This suit is brought by the complainant against the respondents upon letters patent No. 167,570, granted September 7, 1875, to complainant for an improvement in grain-separators. The bill charges infringement, and prays for an injunction and account. The answer denies the alleged infringement, and denies that the claims were patentable in view of a large number of prior patents, to which it refers. Replication filed and heard on the evidence.

In the complainant's patent the claim is stated as follows:

"Having thus fully described my invention, what I claim as new and desire to secure by letters patent is—

"The revolving rake operating in combination with the straw-deflector, S, and shaker, H, substantially as set forth."

This is the only claim relied upon by the complainant, and for the infringement of which this action is brought. The patent is a combination of old devices, which may be patentable where new and useful results are thereby produced. The revolving rake, the deflector, and the shaker are each separately old devices, and each had been used for many years before the complainant's patent.

It is important, in the first place, to determine what was the complainant's combination for which he received his patent. The original model filed in the patent-office has been destroyed, so that it could not be put in evidence for inspection. We have before us the drawings on file in the office—one copy put in evidence by the complainant and another copy by the respondents. In these drawings the position of the deflector in relation to the shaker or carrier seems to differ very much. In that of the respondents the deflector is shown

to approach the shaker so nearly as to render the machine entirely inoperative for the threshing purposes. The complainant's exhibit shows a greater space between the lower part of the deflector and the shaker, but it seems to have been altered after the printing of the drawing. We have also before us a model made by the respondents from the drawing, which shows that the machine, if so made, would be useless for the purpose of the invention. It may be, as claimed by the complainant, that the position of the deflector was in some way changed in making the drawing of the original model, and the complainant intended to give more space between it and the shaker than appears in the respondents' exhibit; but as the patent was issued on the drawings filed, it should be very clearly established that this mistake occurred, before this court should attempt to change it by a decree. On this point the evidence is somewhat conflicting, but we think the preponderance is with the defence.

The combination of these old devices, then, as made and patented by the complainant, did not produce any new or useful results. It is inoperative and without value, and would not do the work for which it was designed. If the machine as now used is practically useful, it has been made so by the changes and improvements suggested and introduced by the respondents and others. The beater and other improvements introduced by the respondents are not only necessary to a successful operation of the invention, but materially change the relations and functions of some of the different parts—notably that of the beater. The function of this part of the combination is entirely different from the functions presented for the complainant's "rotary rake." In the specifications of the complainant's patent its function is described: "The revolving rake pulls the straw from under the straw-deflector, S, and prevents the machine from clogging at this point." For a successful separator, it is necessary to use a beater, one or more, to stop the velocity of the straw as it leaves the threshing cylinder, and also to knock out the grain, and thereby prevent it from passing over the shaker and out among the straw. There is no need of a rake, as such, to get the straw from the deflector, if space enough is left to allow its passage. The velocity of the threshing cylinder with the enclosed box of the machine will drive the straw away from the machine.

We think, therefore, that the complainant's combination as patented has not been infringed by the respondents. This view of the case renders it unnecessary for us to determine whether any of the

machines referred to by the respondents anticipated the patent of the complainant.

The bill is dismissed, with costs.

BAXTER, C. J., concurs in this opinion.

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MACAULAY v. WHITE SEWING MACHINE Co. and others.\*

(Circuit Court, S. D. New York. December 14, 1881.)

1. LETTERS PATENT—VIOLATION OF INJUNCTION.

Where defendant rendered itself amenable to the jurisdiction of the court by appearing in the action, and was enjoined from manufacturing or selling articles infringing upon complainant's patent, *held*, that the injunction was violated by the sale of such articles *outside* of the territorial jurisdiction of the court, whether they were sent within such jurisdiction or not.

In Equity.

F. H. Betts, for plaintiff.

S. A. Duncan and S. J. Gordon, for defendants.

BLATCHFORD, C. J. The injunction was served on Mr. Baylor and on the company. Although it was not served on Mr. White personally, he knew of its service. He, as president of the company, directed the doing of what the company did in violating the injunction. He did not intend to have the injunction violated; but it was violated by the company by selling machines at Cleveland and sending them from there to purchasers. Whether they were sent by it within the territorial jurisdiction of this court or not, the company made itself amenable to the jurisdiction of this court by appearing in this suit. The advice that it was no violation of the injunction for the company to sell machines at Cleveland so long as such machines were not sent by it within the territorial jurisdiction of this court, was erroneous advice. Moreover, some of the machines so sold were sent by the company to places within this district, although Mr. White thought that this district comprised only the city of New York. Mr. White acted for the company. I do not think he ought to be punished personally. But the company must pay a fine of \$250, which will go to the plaintiff towards his expenses and counsel fees about this motion. The profits and damages from the infringement involved in the violation will remain to be accounted for in the suit. Mr. Baylor did not violate the injunction.

\*Reported by S. Nelson White, Esq., of the New York bar.



## BOYKIN, CARMER &amp; Co. v. BAKER &amp; Co.

(Circuit Court, D. Maryland. December 23, 1881.)

## 1. LETTERS PATENT—FERTILIZING COMPOUND.

Patent No. 206,077, July 16, 1878, granted to Boykin, Carmer & Co. for an improved fertilizing compound, held to be invalid for want of any patentable invention or discovery.

In Equity.

*Slingluff & Slingluff*, for complainants.

*Snowden & Busey*, for defendants.

MORRIS, D. J. This bill is filed by the complainants, Boykin, Carmer & Co., against the defendants, R. J. Baker & Co., for an alleged infringement of patent No. 206,077, granted to the complainants July 16, 1878, upon application dated March 1, 1878, for an improved fertilizing compound. The respondents admit that they have been selling the same materials for fertilizing purposes in the same proportions as mentioned in the patented formula, but they claim that they had been doing so long before the date of the patent, and that the patent is invalid for want of novelty.

The compound described in the patent is composed of (1) *dissolved bone*; (2) *ground plaster*; (3) nitrate of soda; (4) sulphate of soda; (5) sulphate of ammonia; (6) dry peat muck, unleached ashes, or any refuse matter having fertilizing properties, in the proportions set forth in the patent.

The proof discloses that a formula for a fertilizer alleged to have been prepared and published by Baron Liebig has been known and in use among farmers and others for 25 or 30 years, and that it was printed and circulated by both complainants and defendants long prior to the date of the patent. It is identical with the patented formula as to the ingredients, their proportions, and the directions for mixing them, in every respect, except that the Liebig formula, as originally published, called for ground bone instead of dissolved bone, and calcined plaster instead of ground plaster.

The issues raised by the pleadings and evidence are (1) whether the formula as patented, calling for dissolved bone or ground plaster, was in public use or on sale for more than two years prior to March 1, 1878, (the date of the application;) and (2) whether, if not so in use or on sale, the patented formula differs from the Liebig formula in any patentable respect, and, if so, were the complainants the inventors or discoverers of the change constituting that difference.

It is proved that there was in common use, prior to March 1, 1876, very numerous formulas for fertilizers, intended to be compounded by the farmers themselves, called by the witnesses "home fertilizers," and that these formulas differed but slightly from each other. It appears that it was the practice of dealers in chemicals to publish and draw attention to these formulas for the purpose of getting persons to buy the ingredients of them. Many of these, including the Liebig formula, were used and published by both the complainants and defendants, and in some of them ground plaster and dissolved bone were called for. There is testimony tending very strongly to establish that in compounding the Liebig formula—that is to say, in a composition in which the ingredients were to be used in the same manner and substantially in the same proportions as in the Liebig formula—there were instances prior to March 1, 1876, in which others than the complainants used dissolved bone instead of ground bone, and ground plaster instead of calcined plaster. The defendants produce a written order from Parker & Watson, of Warrentown, North Carolina, dated January 24, 1876, in obedience to which they supplied the materials in substantially the same proportions as mentioned in the Liebig formula, substituting dissolved bone for ground bone, and ground plaster for calcined plaster; and immediately subsequent to March 1, 1876, numerous instances are proved from the books of defendants.

The testimony of Dr. Starke, of Petersburg, Virginia, also tends strongly to prove that the Liebig formula, with the changes above indicated, making it identical with the patent, was used by him in 1875. He produces a printed circular containing the formula exactly as patented, which he says is the same that he has been using since the fall of 1875. The circular produced was printed in 1878 or 1879, but he states that he is satisfied that it is a copy of the previous ones circulated by him. He is positive that the earlier ones did not call for calcined, but for ground plaster, and he thinks they called for dissolved bone, and not ground bone. Although, of course, it is possible this witness may be mistaken in his recollection, his recollection is supported by an original entry in his sales-book, under date of February 18, 1876, in which a sale is recorded of the materials required for the Liebig formula, and in which *dissolved* bone is one of the items and "plaster" another.

The witness—Dr. Nicholson, of South Hampton, Virginia—testifies very positively that the printed circular produced by him, which

is identical with the Liebig formula, except that it calls for *ground plaster* instead of calcined plaster, was printed and circulated for him in 1875.

This evidence is very persuasive in support of the defence of prior public use, and goes very far towards overcoming the presumption in favor of the patent. It has very important weight, also, when considered in connection with other facts and testimony adduced to show the absence of patentable invention or discovery in the patented formula.

That the Liebig formula was the foundation of the one patented by the complainants there can be no doubt. The ingredients, with the changes above mentioned, are the same, the proportions are the same, the directions for mixing are in the same words, and the general similarity such as could not have been accidental. Dr. Boykin, one of the complainants, and the only one examined as a witness, in his testimony states the circumstances which led him to introduce dissolved bone and ground plaster in the formula as patented by them. He says:

"As well as I can recollect, about 1872 or 1873, as we were in the drug business, customers began ordering from us chemicals to make fertilizers. The first order, I think, we had was from a party in North Carolina, for a formula known as Bryant's Compound, which was not very unlike formula No. 1, [the patented formula;] worth probably three or four dollars a ton more. The quantities were larger. They used South Carolina phosphate in place of bone. Later on we had orders for formulas very similar to what is known now (I did not know it at that time) as Liebig's Compound and Harris' Compound, all varying in amounts, in the articles, but not very unlike. When we would get orders for these different formulas from one party, in the same neighborhood probably somebody else, not knowing what the formula was, would write us to know what the formula was. We issued two or three circulars, with these two or three formulas on them, in order to save writing letters and answering in that way. Finally, from our observation of the success of certain ones, we were led to introduce dissolved bone as being superior to anything else. After using that for awhile the demand for it was so great (we saw the value of it, and issuing these circulars was making a reputation and name for it in certain localities, by persons who saw other parties whom we had given the article to and were buying it) that we were induced to settle upon this article of dissolved bone as being an improvement on any other that we had seen, and the ground plaster an improvement on calcined; and we made application for a patent."

In another part of his testimony, in answer to a question as to the date when the changes in the formula were made, he says:

"The changes were made in the 'home fertilizers' at the time we made application for the patent, and we then, as I have stated before, concluded, inasmuch as dissolved bone was an improvement on fine bone, to use that in the place of it, and we made application for the patent with that improvement—at least, with that change—for dissolved bone instead of bone dust or fine bone, which we had been using before. I know it was the date of the application of the patent, but I cannot tell you how near that date it was, or anything about it, without reference to the books. We all agreed among ourselves that dissolved bone was an improvement on bone dust; and we made application for the patent with that understanding, that it was an improvement, and that it was the great improvement in our formula."

When Dr. Boykin states that from the complainants' observation of the success of certain formulas, and I think he means by this the increasing demand, they were led to introduce dissolved bone as being superior to anything else, he does not of course pretend to any claim to have discovered the merits of dissolved bone as a fertilizer. Dissolved bone had then for 15 or 20 years been well known, among persons using or dealing in fertilizers, as one of the approved methods of preparing bone phosphates for that purpose, and dissolved bone was on all the price-lists of such dealers, and was called for in some of the many formulas produced in evidence which were in use prior to 1876. The virtues claimed for it as compared with ground bone, bone meal, or bone dust, for fertilizing, were known, and were the subject of discussion and experiment. It appears from the expert testimony to have been thought then, as now, that the dissolved bone was more immediate in its effects but not so lasting; that if there was present in the soil sufficient soil water to dissolve the ground bone as rapidly as required by the plant, it was to be preferred as cheaper and more lasting, but that if there was a deficiency of soil water, so that the ground bone was liable to decompose too slowly, then the dissolved bone was the better. One of the complainants' experts states that he has known dissolved bone to have been used in formulas for fertilizers, in greater or less quantities, for 15 years past.

All that the complainants can possibly claim, so far as the dissolved bone is concerned, is that they have substituted in the Liebig formula one well-known form of bone phosphate fertilizer for another well-known form. Beyond the presumption arising from the patent, there is very little to show just when they made this change. The testimony of Dr. Boykin leaves it very uncertain. In one part of his testimony above quoted he says the change was made by them at the time they made application for the patent, viz., March 1,

1878; and in another part he says, in answer to a very leading question, that they never used dissolved bone in the Liebig formula prior to March 1, 1876. There is abundant testimony that it was used constantly by the defendants during the year 1876, subsequent to the first of March.

Whenever it was that the complainants began substituting the dissolved bone in the Liebig formula, it is very evident that they did not then themselves think that they had made a discovery or had originated anything which they could claim as new. This appears conclusively from a circular of four pages issued by them in 1875 or 1876. With regard to the date when this circular was issued, Dr. Boykin states it was the first circular they ever issued, and his best recollection is that it was in 1876, although he is not certain whether it was in 1876 or 1875. From all the facts connected with it, it would appear hardly possible that it could have been issued later than the spring of 1876. In this circular the formula, precisely as patented, is printed, and the attention of farmers is earnestly called to the advantages of preparing their own fertilizers by this formula. In it three letters commending it are printed, all of them dated in 1875, and reference is made to Dr. Nicholson, who is stated to have bought for his neighbors "last year" over 100 tons of this fertilizer. In this circular the complainants say:

"After investigating the matter with great care and some expense; after consulting agricultural chemists and many of our most intelligent and successful farmers,—we do not hesitate to advise the use of the chemicals in the attached formula."

The circular concludes:

"We do not claim it as any specialty of ours, though we have sold large quantities of it, and will sell as low as you can get a pure article anywhere else."

The 100 tons which the circular states Dr. Nicholson bought from the complainants appears from his testimony to have been purchased not later than 1875; and of the commendatory letters one is dated June, 1875, and the others August, 1875. The explanation given by Dr. Boykin of this circular is that the letters were from persons who had never used the formula as then printed, but who had used the Liebig formula and similar formulas, all called by the complainants "home fertilizers;" and as the complainants were confident they had improved these formulas, they used the letters, although they were not literally true as applied to the formula printed with them,

and to which they were attached. Accepting this explanation, still the circular does clearly show that the complainants did not then think that their change in the Liebig formula was anything in the nature of a new discovery. In this long and full circular, in which they use many arguments to prove the excellence of the fertilizer now patented, they not only do not call any attention whatever to the change as new and important, but they felt at liberty to use letters written with regard to a formula which they now claim was essentially different; and, moreover, they then expressly declared to the public that they did not claim the altered formula as any specialty of theirs.

This is not similar to a case of alleged abandonment of an invention. It is not a case in which an inventor says, "I do not intend to patent my invention;" but it is a case where parties having entirely perfected what they subsequently claim as a discovery, say, when the whole matter is fresh under their hands, "This is nothing new; we disclaim it as any specialty of ours." It seems to me that this disclaimer so made is entitled to great weight, and, considering it in connection with all the other facts and testimony in the case, I am convinced that the change made by the complainants in the Liebig formula, even if they were the first to make it, which would appear extremely doubtful, was not the result of invention or discovery.

In the state of the general knowledge concerning fertilizers which existed on the first of March, 1876, I cannot think that it required experiment or invention to find out that dissolved bone might be, for some purposes and for some soils, profitably substituted for ground bone. In the language of Judge Lowell, (*Smith v. Nichols*, 1 Holmes, 175,) it was "the application of known means in a known way to produce a known result." As was said by the supreme court in the same case, on appeal, (21 Wall. 119,)—

"A mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent."

The process, as detailed by Dr. Boykin, by which the complainants were led to adopt the patented formula, is not such as suggests a patentable mental result. They were dealers in drugs, selling the chemicals required by farmers for compounding fertilizers, and by

watching the demand for and the reported success of certain formulas sold by them, they were led, he says, to settle upon dissolved bone as superior to anything else. This tends strongly to show an intelligent judgment, or business sagacity, in selecting from things well known and in public use, but it does not show invention or discovery. If the Liebig formula was protected by an existing patent, I do not see that it could be successfully contended that the change made in it by the complainants was not a mere substitution of equivalents, and an infringement.

I have not overlooked the testimony of one of the complainants' experts with regard to the chemical properties contained in and developed by the dissolved bone, and not contained in or developed by the ground bone. But these properties of dissolved bone were known; their use in fertilizers was known; and it was a common practice to make use of them in fertilizing compounds, the other ingredients in which were not very different from the one in controversy. Whenever a new material is substituted for an old one in an article of manufacture, as silk for cotton, steel for iron, metal for wood, a better result may be obtained, and one which may give a greatly increased beauty, usefulness, or commercial value to the article produced, and may greatly increase the demand for it; but this is a result which is to be attributed to mechanical skill or business enterprise, and not to invention as that word is applied to patents.

With regard to the substitution of ground plaster for calcined plaster, the considerations above stated with regard to the bone apply with still greater force. Indeed, it appears somewhat doubtful whether any one skilled in compounding fertilizers would, in 1876, have used calcined plaster in the Liebig formula. When plaster for fertilizing purposes or land plaster is mentioned, it seems to be generally understood to be ground plaster, and certainly required no invention to make use of it in the Liebig formula.

In my opinion the complainants' patent is invalid, and the bill must be dismissed.

## WESTERN ELECTRIC MANUF'G CO. v. ANSONIA BRASS &amp; COPPER CO.

(Circuit Court, D. Connecticut. December 12, 1881.)

## 1. LETTERS PATENT—TELEGRAPH WIRES—OLD PROCESS—NEW USE.

An application of an old process to a new use without substantial alteration or change is not patentable.

Reissued letters patent Nos. 6,954 and 6,955, dated February 29, 1876, and granted to the Western Electric Manufacturing Company, as assignee of Joseph Olmsted, for an improvement in insulating telegraph wires, the invention consisting in the discovery that compression of the paraffine into the pores of the fibrous covering by any well-known mechanical appliance would be advantageous, are void for want of novelty.

In Equity:

*Wm. D. Baldwin and George P. Baront*, for plaintiff.

*Wm. B. Wooster*, for defendant.

SHIPMAN, D. J. This is a bill in equity, founded upon the alleged infringement of two reissued letters patent granted to the plaintiff, as assignee of Joseph Olmsted, each for an "improvement in insulating telegraph wires," and dated February 29, 1876, and respectively numbered 6,954 and 6,955, and being reissued in two divisions (one for the process and the other for the product) of a patent granted to said Olmsted on July 23, 1872.

The specifications of each reissue are the same, and accurately describe the patented improvement upon the method which was then commonly used for insulating office wire. The entire descriptive part of the two specifications is in these words:

"The method of insulating now in use consists in braiding over the wire a fibrous covering, after which it is dipped in wax, for the purpose of filling and closing its pores, and after a subsequent scraping, to remove the surplus wax, it is ready for use. This method is, however, objectionable, inasmuch as it leaves the covering in a very rough and soft condition, and fails to secure perfect insulation. In my improved method, after the wire has received its coating I dip it in paraffine or wax, after which, instead of scraping off the surplus coating, I pass the whole through a suitable machine, which compresses the covering, and forces the paraffine or wax into the pores, and secures perfect insulation. By so compressing the covering, the paraffine or wax is forced into the pores, and the surface becomes and appears polished. Wire insulated in this manner is entirely impervious to the atmosphere, of greater durability, and less cumbersome than any heretofore made."

The claim of the process patent is for "the method of insulating telegraph wire by first filling the pores of the covering and subsequently compressing this covering, and thereby polishing its surface, substantially as described."



The claim of the patent for the product is for "an insulated telegraph wire, the covering of which has its pores filled and its surface polished, substantially as described."

The defect in the article coated with uncompressed paraffine was a leakage of electricity, which was probably owing to the shrinkage of the paraffine in the interstices of the fibrous covering while the melted paraffine was cooling. The paraffine which was compressed while in a plastic state was thereby forced into the interstices of the fibers and the defect was obviated.

The defendants make and sell telegraph wire, which they say in their answer is "covered by braiding over the wire a fibrous covering, after which it is dipped in a preparation for the purpose of filling and closing the pores; after which the same is sand-papered and rubbed, and passed through revolving dies, for the purpose of scraping off the surplus material, and consolidating and smoothing the surface of said remaining covering." They further admit that both paraffine and wax are component parts of the material which is used for insulating their wire.

I shall spend no time upon the question of infringement, which I think was clearly shown. The utility of the plaintiff's article was also proved.

The important question in the case is in regard to the patentability of the improvement, which consisted in compressing the plastic paraffine, by suitable machinery, after the fibrous covering and the paraffine had been applied. The mechanism for compressing was so well known that a description was unnecessary. The invention consisted in the discovery that compression of the plastic paraffine into the pores of the fibrous covering, by any well-known mechanical appliances, would be advantageous. It did not consist in the discovery that covering with paraffine or wax would be desirable, for wire covered with braided fibrous covering and dipped in wax was in common use; but the invention simply related to the substitution, in place of a mere scraping off of the rough clots of wax, of a pressing operation for forcing the insulating material into more intimate contact with the fibrous material, and, so far as the product is concerned, the invention related to a wire insulated and polished upon its surface, by means of compression of the waxed covering, as distinguished from the insulation and surface which was the result of non-compression of the same covering.

Dundonald's British patent of 1851, No. 13,698, declares that he employed "bituminous material to cover and thus insulate the con-

ducting wires of electric telegraphs which are intended to be placed underground. \* \* \* He further says:

"The encasement of this wire with bitumen may also be effected by covering it with a filamentous material, which has been previously saturated with melted bitumen, and then pressing the wire so covered through a heated die or orifice, so as to melt or soften the bitumen upon the filamentous material, and press the whole of the coating against the wire in such a way as to cause it to form one compact, continuous covering of the wire, and thus insure its insulation."

The same general process of compression is found in Bandorein's British patent No. 933, of 1857, for electric conductors. The specification says:

"The wire is passed through a bath of hot bitumen, and has the superfluous matter removed by passing through suitable dies or parts to scrape and smooth its surface, and render it of uniform thickness. The first and second ribbons [which are strips of material to be wound on the wire] are also passed through bituminous or other suitable matter to render them more impervious to electricity. The coated and lapped wire is passed through suitable dies to remove superfluous matter, to smooth down the lapping of the ribbons, and to compress and cause their proper adhesion."

It thus appears that the process of compression had been used, for some years before the date of Olmsted's patent, in the manufacture of electric telegraph wire previously covered with cloth and then coated with bitumen or fatty substances, and having been so used, there is no longer patentability in compressing the paraffine covering of a wire coated with fibrous material.

The patented process "was simply the application by the patentee of an old process to a new subject, without any exercise of the inventive faculty, and without the development of any idea which can be deemed new or original in the sense of the patent law." *Brown v. Piper*, 91 U. S. 37. The patentee took the process of Dundonald and of Bandorein, which they had applied to bitumen, and applied it to the wax covering which was in common use, and had been found to be superior for certain classes of wire to any insulated covering which had been previously used or suggested. The old process was applied to the new use without substantial alteration or change. The process patent not stating a patentable invention, the product patent is in no better condition.

The bill is dismissed.

## THE FAVORITE.

*(District Court. N. D. Illinois December 12, 1881.)*

## 1. STEAMER WITH A TOW—SAILING RULES 20 AND 21.

Where there is ample sea-room to make every maneuver necessary to insure safety, a steamer with a tow is bound by sailing rules 20 and 21 of section 4233 of the Revised Statutes—which require a steam-vessel (1) to keep out of the way of a sail-vessel, when the two vessels are proceeding in such directions as to involve risk of collision; (2) when approaching another vessel so as to involve risk of collision—to slacken her speed, or, if necessary, stop and reverse.

In Admiralty.

*Schuyler & Kremer*, for libellants.

*Richberg & Kniep* and *McCoy & Pratt*, for respondent.

BLODGETT, D. J. This is a libel by the owners of the schooner *Grace A. Channon*, for damages by a collision between the schooner and the steam-propeller *Favorite*, on the waters of Lake Michigan, on the night of August 2, 1877, whereby the schooner and her cargo became a total loss. It is claimed by libellants that the collision occurred by reason of the negligence of those in charge of the steamer in not keeping out of the way of the schooner, while the respondents, the Kirby-Carpenter Company, owners of the steamer, insist by their answer and proof that the collision was so far contributed to, if not caused, by the negligence of those in charge of the schooner in not keeping her on her course, as to relieve the steamer from liability; and also that the steamer, being encumbered with tows, is not governed by rules 20 and 21 of section 4233 of the Revised Statutes of the United States.

The undisputed facts material to the issue are that on the night of the collision, the schooner, in pursuing a voyage from Buffalo to Chicago with a cargo of coal, was between Milwaukee and Racine, along the west coast of Lake Michigan, about nine miles from land, and the steamer was bound from Chicago to Menominee, light, with three barges in tow, also light. The wind was from west to west by north; the night clear. The schooner and steamer each had their proper lights burning, the steamer having two bright white lights burning at her mast-head, to indicate that she was towing other vessels.

The sailing rules involved in this controversy are:

Rule 4. "Steam-vessels, when towing other vessels, shall carry two bright white mast-head lights vertically, in addition to their side lights, so as to distinguish them from other vessels," etc.

Rule 20. "If two vessels, one of which is a sail-vessel and the other a steam-vessel, are proceeding in such directions as to involve risk of collision, the steam-vessel shall keep out of the way of the sail-vessel."

Rule 21. "Every steam-vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam-vessel shall, when in a fog, go at a moderate speed."

It is not my purpose to go into a full analysis of the voluminous proof taken in this case, as that has been sufficiently done in the exhaustive report of the commissioner, filed herein. It is sufficient for my purposes to say that it clearly appears from the proof that the Channon was proceeding on her voyage upon a southerly or nearly south course, with a light sailing breeze, at the rate of from five to six miles per hour, with the wind over her starboard quarter a little abaft the beam, when, about a quarter before 10 o'clock, her lookout saw the mast-head lights of the steamer at a long distance (say from five to seven miles) nearly dead ahead. He reported the light to the captain, who reconnoitered it through his glass and ascertained that it was the light of a steamer towing other vessels. Soon afterwards the steamer showed her green light, about a half a point or a point over the port bow of the schooner. The speed of the steamer at the time she sighted the light of the schooner, and up to the time of the collision, was about seven miles per hour. The two vessels continued to approach each other, nearly end on, until quite close—probably less than a mile of each other; and when the sails of the schooner could be seen by those on the steamer the schooner showed a torch, and shortly afterwards, thinking, as stated by one of the witnesses, that the steamer was coming right into them, the wheel of the schooner was put to port, and she luffed a point or two into the wind, and at that moment was struck upon the port bow just abaft the fore-rigging, and so injured that she sunk within five minutes.

It is contended on the part of those in charge of the Favorite that the schooner changed her course; and there is considerable testimony in the case on the part of the respondents to the effect that the lookout on the steamer first saw the green light of the schooner, from which they argue and insist that the course of the schooner must have been somewhat east of south, and that she was to the leeward or east of the course of the steamer. I do not think it necessary to attempt to reconcile the contradictions between the witnesses who were upon the schooner and those on the steamer as to which light the schooner first showed to the steamer. The testimony of

both classes of witnesses concurs in establishing the fact that the courses of the two vessels were nearly directly towards each other. The schooner was sailing south, and the steamer was going north, half west. They were approaching each other nearly end on.

It is possible that from time to time, as the schooner fell off from the wind, or luffed up into the wind, she may have disclosed her green light to the lookout on the steamer. They were approaching each other so nearly in a direct line that it is possible, and perhaps probable, that the schooner may have shown at different moments, without substantially varying her general course, each of her lights to those on the steamer. But, as I have already said, the material fact is that the two vessels were approaching each other nearly end on. The steamer made no effort to get out of the way, unless it be that at some interval of time after the light on the schooner was discovered the wheel of the steamer was put to starboard and she swung off a point or a point and a half to port, where she was steadied, and ran for a short time, until the schooner showed her torch, and very shortly after that the collision occurred. I attach but little significance to the maneuvers which were executed or attempted on the part of the schooner or the steamer when in immediate proximity to each other, and a collision was imminent. What men do, or attempt to do, under such circumstances of danger, is frequently of little import in determining the question of responsibility for a collision.

The material question is whether there was any negligence, and by whom, in allowing the two vessels to come so close together as to bring on an impending collision. It has been urged with much ability and force, on the part of the respondents, that the steamer being encumbered with tows, and having indicated that fact to the schooner by the lights carried at her mast-head, was not bound by the provisions of sailing rules 20 and 21, and that the officers of the schooner had an additional degree of responsibility thrown upon them, from the fact that they knew they were meeting a steamer towing other vessels; and, in support of this decision, I am cited to the opinion of the supreme court in the case of *The Syracuse*, 9 Wall. 672, where the court says:

"A tug, with vessels in tow, is in a very different condition from one unencumbered; she is not mistress of her motions. She cannot advance, recede, or turn either way at discretion. She is bound to consult their safety as well as her own. She must see that what clears her of danger does not put them in peril. For many purposes they may be regarded as a part of herself." Page 675.

And also to the analogous reasoning of the learned judge of the eastern district of New York in *Millbank v. The Schooner Cranmer*, 1 FED. REP. 256.

I think it sufficient, for the purposes of this case, to say that in both the cases cited the collisions occurred in a crowded stream or roadstead, where all vessels are charged with increased obligations of mutual care, which do not bear upon them when upon the open sea. But in this case the collision occurred upon the open lake, where there was ample sea-room to have made every maneuver necessary to insure safety. There were no other vessels to interfere with such maneuvers, and, so far as the evidence shows, no lights of other vessels to bewilder or embarrass the parties in charge of the steamer. The obvious duty of this steamer, under the sailing rules, especially as she was encumbered by her tows, was to immediately or in ample time take such steps as would prevent the two vessels from coming in dangerous proximity to each other.

By the sailing rules the schooner was bound to keep her course. There is nothing in the rules, nor in the nature of the two vessels, that requires or allows a sailing-vessel to change her course when she sights the lights of an approaching steamer with tows. Her duty under the rules is to keep her course, and the duty of the steamer is to keep out of the way of the sailing-vessel. The steamer has the right to elect on which side of the sailing-vessel she will pass, but is bound to exercise that right with sound judgment; and therefore any deviation by the sailing-vessel from her course would embarrass the steamer and endanger both. Notwithstanding the fact that the *Favorite* had barges in tow, she was still a steamer, and under rules 20 and 21 bound to keep out of the way of the schooner. Her officers knew that owing to the three barges astern she was, for the purposes of many maneuvers upon the lake, lengthened to the extent of her barges and the tow lines connecting them to her, and that, therefore, it would take longer to make the necessary detour from the course of the schooner in order to secure safety; and the only difference I can see between the obligation of a steamer with or without tows upon the open lake, as these two vessels were situated, is that the steamer, when encumbered with tows, must commence her maneuvers so promptly after sighting the lights of a sailing-vessel as to make sure that she will not only herself go clear of the sailing-vessel, but that her tows will also go clear.

The sailing-vessel, in a crowded roadstead, coming close to tows under the control of a tug, is, undoubtedly, bound to use such reason-

able precautions, as are in her power, to avoid a collision with the tows, and the failure to use such precautions might, under certain circumstances, be such negligence as would create liability on the part of the schooner for a collision; and this was the case of *The Cranmer*, *supra*, decided by Judge Benedict. But the law or rules of conduct governing such cases is not applicable to a case like this. Here was ample sea-room, and any deviation by the schooner only increased the danger of both vessels.

I conclude, from the testimony on the part of respondents, that the lights of the schooner were not sighted by the lookout of the steamer so soon as the lights of the steamer were sighted by the lookout on the schooner; and it also appears that the captain of the steamer was the officer of the deck at the time, and for an hour or more preceding the time this collision took place. While the lookout was watching the light, before he had reported it to the captain, the captain came forward, having discovered the light himself, and looked at it through his glass. His own version of what took place on his steamer, as detailed in the testimony, is substantially in these words:

"In the first place, I was walking the deck, back and forth, across, as I generally do, on the after-part, by the cabin, so I had a view of anything coming ahead and a view of the tow behind. At that time I imagined I saw a green light on the starboard bow. I walked forward and took my glass out of my state-room to look at this light, and from its situation it seemed to me she was steering out of the course, and not encroaching on us. I told the watchman to keep a smart lookout for the light. '*Don't let her get too close to us. There is no danger now. I am going aft.*' The light bore about a point and a quarter or a point and a half on my starboard bow. What called me aft, I had a call of nature. During the time I was in the closet I was hunting in my pockets for paper, and I found there a letter, a moneyed letter from London, that one of my men had given me that day. When I came out of the closet I went into my room to put the letter in the safe. As I locked the door of the safe and turned around I heard the lookout running aft on the port side of the vessel. He said: 'The green light is shut in and he is showing his red light and a torch-light.' I told him to run and port his helm, and followed after immediately. I also gave the order to 'port.' I went on the port side and took the bearings. I looked over my rail, across the weather side from the stem, and could not see him. Then I knew there was danger. Then I stood and took the correct bearings across about 10 feet back from the stem. Then I saw he appeared aft of our stem, on our starboard bow, across the deck, where our fore stay-sail was hauled down and rolled up in a netting. To see this light I had to rise up and look over the sail, which he bore about three points on our starboard bow. I looked at him a few seconds and saw it was impossible to clear him with our wheel a-port, as the vessel seemed

to be swinging to windward, and put my wheel starboard, in the hopes of swinging up side by side and avoiding the blow; but we came in collision immediately after the order was given to starboard, and struck the schooner in the after-part of the fore rigging. As soon as, after the collision occurred, I could get up on deck, I stopped the engine. The schooner at the time of the collision, from all appearances, was heading south-west, westerly, and the propeller was heading between north, half west and nor'-nor'-west."

According to the account given by the captain, who discovered the schooner's light about the same time as his lookout, he saw the schooner's light in such a situation as to know that the two vessels were approaching each other in a nearly direct line. He knew that it was his duty to keep out of the way of the schooner, and yet, without any orders to that effect, he simply retires to the after-part of his steamer, leaving the lookout in command on the deck under circumstances which called for instant and continuous vigilance, and required the constant attention of an experienced and responsible officer. His own speed was about seven miles per hour, and he knew the wind was such as gave the schooner nearly the same speed, and yet, after having answered the call which took him aft, the captain gave his attention to a matter which had nothing to do with navigating his ship, and which he had previously forgotten; and during the time that he was unnecessarily staying aft to put the letter in the safe, it is probable that the two vessels got into the dangerous position which produced the collision. Had the order been given at once, inasmuch as she had a right to choose on which side of the schooner she would pass, to change the course of the steamer so as to clearly indicate to those on the schooner that she was intending to give her a wide berth, and had the master returned to his duty as officer of the deck promptly after having visited the water-closet, it is probable that, with his experience and the duty devolving upon him at the time the red light and torch were shown, he could then have changed the course of his steamer so as to have avoided the collision. The amount of time which was lost may have been very inconsiderable, but it was precious time, and no conduct of his afterwards, in the management of his vessel, could retrieve that loss. When he was summoned by the call of the lookout to the command on the deck, it was too late to atone the negligence which had already occurred. So, too, the proof shows that the steamer could have been stopped in about her length by reversing her wheel, and it seems to me almost certain, in the light of the proof, that if the wheel had been reversed,



even after the torch was shown, the collision would have been prevented. It is true that, by reversing the wheel without some change in the direction of the steamer, she would have been somewhat imperilled by her tow, but that was a matter which the master should have had in mind all the time, and made the necessary maneuver with due caution; still, that does not relieve him from the obligation to reverse, if the occasion or necessity demanded it. He should have been ready to slacken speed or stop, as the exigency required, but made no effort to do so.

It therefore seems very clear to me that the collision in this case was caused by the negligence on the part of those in command of this steamer. I have very carefully read the testimony, and have carefully considered the arguments which have been made on the part of the respondents in support of their exceptions to the finding of the commissioner, and must say that I am wholly content with the conclusions at which the commissioner has arrived, in his report, and shall overrule the exceptions, confirm the report, and enter a decree for the libellants, in accordance with the recommendations of the report.

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### THE LEVI DAVIS.

*(District Court, E. D. New York. December 13, 1881.)*

#### 1. SALVAGE—TUG AND TOW.

The amount of salvage determined where a tug assisted another tug that was temporarily disabled while the two were landing a tow, and rescued her from peril and helped to bring her into port.

#### In Admiralty.

The tug Leonard Richards was employed to assist the tug Levi Davis in towing a raft and catamaran, loaded with lumber, from New York to Barnegat inlet. The Davis was able to go over the bar at Barnegat, but the Richards was not. The tow was in charge of a pilot supplied by the Davis, which was the leading boat. The agreement with the Richards was to help transport the tow to "off Barnegat inlet." When the tow arrived off Barnegat, a storm was threatening and the sea was heavy. Presently the Richards struck the bottom, when she at once cast off the hawser to the Davis and cut the hawser to the tow. The Davis then proceeded to the tow, and in so doing struck the bottom herself and broke her rudder. She

then signalled the Richards to help her, and the Richards, returning, took hold of the Davis, held her, and lay by her that night. Next day the Richards began to tow the Davis back to New York, and took her nearly to Sandy Hook, the last part of the voyage being performed by the Davis unaided. The tow drifted into the inlet unaided and without sustaining injury.

Libel was filed to recover salvage for the Leonard Richards against the Levi Davis.

*Benedict, Taft & Benedict*, for libellant.

*Beebe, Wilcox & Hobbs*, for the Davis.

BENEDICT, D. J. My conclusions in this case are as follows: If, as asserted by the claimant and denied by the libellant, the Richards broke her contract by casting off the tow before the Levi Davis took hold of it, still such failure to perform her contract, if failure it was, did not create or tend to create the peril from which the Levi Davis was afterwards rescued. It would have been necessary for the Davis to get hold of the tow if the Richards had not cast off when she did, and, as the tow was situated, she could not have done so without danger of striking the bottom. The peril was caused by the Davis having taken the tow into shallow, and, under the circumstances, dangerous water, and it was in no way increased by the act of the Richards in casting off the tow when she did, and after she herself had struck the bottom. The Davis was rendered helpless and in need of immediate assistance by the breaking of her rudder, and that misfortune is not attributable to any act or misconduct on the part of the Richards.

When the Davis thus became disabled by the breaking of her rudder, and liable to be driven ashore in the gale, the Richards was under no legal obligation, arising out of the contract or otherwise, to tow her out of danger or to render her any other service. It was, therefore, open to the Richards, when the Davis signalled for assistance, to undertake to assist her in the capacity of a salvor. At the time when the Richards undertook that service the situation of the Davis was one of much peril. By the exertions of the Richards she was rescued from her peril and brought back to New York in safety. The service was valuable. It was voluntary, and compensation for it depended upon success. For such a service the Richards is entitled to a salvage reward.

In determining the proper amount of such reward I observe, among other things, the peril in which the Davis was placed by the breaking

of her rudder when so near Barnegat shoal in such a gale. The extent of the peril is shown by the act of the master in putting on a life preserver. The Davis was kept from going ashore by being taken hold of and held by the Richards during the whole of a terrible night. She was then, being still disabled in her rudder, towed by the Richards from Barnegat to the Hook, and then accompanied to Jersey City at her special request, because, although her rudder had been made available to a certain degree, the condition of it rendered her liable again to become helpless at any moment. I also take notice of the value of the Davis, some \$6,000, and that of the Richards, some \$22,000; that the Richards sustained no loss save that of labor and time; and, if she encountered any peril to herself in the performance of the service, it was not serious.

Upon the whole case, I consider that the sum of \$750 should be allowed as salvage. The allotment of this sum will be made after hearing counsel in respect thereto.

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### THE CETEWAYO.

(*District Court, E. D. New York. December 17, 1881.*)

#### 1. SALVAGE—WRECKING VESSELS—RIGHT OF CREW TO SALVAGE COMPENSATION.

The fact that a salving vessel was used in the wrecking business does not compel the inference, that the monthly wages agreed to be paid the crew were to be in lieu of any share in any salvage reward to which otherwise they might become entitled.

In Admiralty.

*Beebe, Wilcox & Hobbs*, for libellants.

*Owen & Gray*, for claimants.

BENEDICT, D. J. This is an action, instituted by the chief engineer and a deck hand of the steam-boat *Alert*, to recover a share of the salvage compensation earned by the *Alert* in rescuing a derelict schooner called the *Cetewayo*. The particulars of the service rendered to the *Cetewayo* are not important to be noticed on this occasion, because it is admitted of record that the service was a salvage service, entitled to be compensated as such. It is also admitted that 50 per cent. of the value of the property saved is the proper amount of salvage, and that such percentage amounts to \$2,643.93.

The only question presented for my determination is whether the libellants' agreement of hiring on board the *Alert* debars them from

the right to share in the salvage award referred to; which reward, it may be remarked, was conceded at the argument to have been paid to Scott, the owner of the *Alert*, since the filing of the libel herein, upon his agreeing to assume the defence of this action.

The fact relied on to sustain the position that the libellants are not entitled to maintain this action is thus stated in the answer: "As the claimants are informed and believe, none of the officers or crew of said tug had any interest whatever in the compensation to be paid for the services, having engaged in the wrecking business, and being paid for such particular service; and therefore never had any claim against said schooner for compensation for the services performed by said steam-tug." In regard to this defence it may be remarked that on its face it seems insufficient. The fact that the libellants engaged to work for pay in the wrecking business does not necessarily deprive them of the right to engage in a salvage service, and to participate in the reward thereof. Wrecking business is not in all cases salvage business. Whether, in any case, a wrecker performs a salvage service depends upon the circumstances. Scott, the owner of this tug, claims to be a wrecker by occupation, while he admits that he rendered a salvage service to the *Cetewayo*, and has not only claimed but been paid a salvage reward for the same. Treating the answer, however, as setting up an agreement on the part of the libellants to abandon to the owner any right they might acquire by reason of being engaged in performing salvage services while employed on the *Alert*, the question arises whether such an agreement can be upheld in the face of the provision of law to be found in section 4535, Rev. St., where it is declared that every stipulation in a seaman's agreement, to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative. This statute certainly affords room to contend that such an agreement as the claimant relies on must be held void, notwithstanding the subsequent act of June 9, 1874, (18 St. at Large, 64; Supp. Rev. St. vol. 1, p. 31.) See remarks in case of *M'Carty v. Steam-propeller City of New Bedford*, 4 FED. REP. 818. It may, perhaps, be possible to hold that the provision in section 4535 was not intended to apply in cases where a seaman, with full knowledge by an express agreement, undertakes to engage in a salvage service, and to waive any compensation therefor other than his regular wages. Although in England, where the Merchants' Shipping Act contains a provision from which the provision of our statute appears to have been copied, with the rest, it

was thought best to limit the effect of the provision by a subsequent statute. See Amendments to Merchants' Shipping Act in 1862, § 18; *MacLachlan, Shipping*, Sup. 12, 13. But, however this may be, as no point has been made upon the statute by the libellants in this case, the present case may well turn upon the question of fact on which the libellants have supposed it to turn, namely, whether any agreement was ever made by the libellants by which they abandoned or waived their right to participate in the reward for saving the schooner proceeded against. Upon this question of fact the testimony of each libellant is that he was hired at monthly wages in the ordinary manner, and that nothing whatever was at any time said by either party in regard to an abandonment or waiver of any right to claim salving; and there is no direct evidence to the contrary of this. The wages agreed to be paid to the men were ordinary monthly wages, such as are paid for ordinary services.

The case is thus reduced to the question whether the nature of the employment in which the *Alert* was engaged, at the time the libellants were hired, compels the inference that it was understood by them that the monthly wages agreed to be paid them should be in lieu of any share in any salvage award to which otherwise they might become entitled as part of the crew of the *Alert*. In my opinion no such inference can properly be drawn. It has been made plain that the *Alert* was engaged in wrecking, but wrecking does not necessarily include salving; and there is no proof that the *Alert*, during the time of the libellants' service, ever earned a salvage reward except in the case of the *Cetewayo* now under consideration. Scott, the owner himself, says that for the most part the boat worked under contract, and he does not say that her compensation was ever, except in this instance, dependent on success. No inference, adverse to the present demand, can therefore be drawn from the fact that in no other instance have the libellants claimed to be entitled to salvage. There is, in truth, nothing in the case from which to infer an agreement on the part of the libellants to abandon their right to participate in the salvage in question, except the bare fact that the vessel on which they were shipped was so equipped as to enable her to successfully perform salvage services in case the occasion for such services should arise. I am not prepared to say that, aside from the statute, a valid agreement might not have been made with these men which would have been a good defence to the present action, but I am quite sure that such an agreement is not proved by any evidence in this case.

There are abundant and obvious reasons for requiring, in cases of a defence like the present, clear proof of a plain agreement, made with due consideration for the seaman, and with full knowledge on his part, before a court of admiralty will feel justified in allowing the reward, which the maritime law gives for personal merit and upon grounds of public policy, to be diverted from the hands of those who perform the labor to the pocket of him who owns the ship. In this case there appears to me a total absence of such proof as the law requires, and therefore there is no other way but to adjudge the libellants entitled to share in the salvage under consideration.

Inasmuch as it appears that the libellants are the only persons whose claims have not been paid or adjusted, there only remains to determine the share of \$2,643.93, admitted to be the gross amount of the salvage, proper to be awarded to the libellants. In view of all the circumstances I am of the opinion that \$150 is the proper allowance to be made to the libellant Enos, and \$100 the proper allowance to the libellant Cavanagh.

A decree will accordingly be entered in favor of the libellants, respectively, for the above-named amounts, and they must recover their costs.

## ROGERS v. R. E. LEE MINING Co. and others.

*(Circuit Court, D. Colorado. December 5, 1881.)*

## 1. ATTORNEY AND CLIENT—CONTRACTS BETWEEN THEM—WHEN VOIDABLE.

A contract of purchase and sale between an attorney and client is voidable at the election of the latter, where the attorney, while negotiating for the purchase of the property, is acting for the client in a litigation of which it is the subject-matter, and is called upon to advise the client, as an attorney, as to how far such litigation is likely to affect his title to the property, or the value of his interest in it.

## In Equity.

*Luther S. Dixon*, for plaintiff.

*Wells, Smith & Mason*, for defendants.

McCARY, C. J. 1. It is not necessary to decide the question whether an attorney at law can, under any circumstances, purchase *pendente lite*, from his client, the subject-matter of a litigation in which he is employed and acting.

2. Equity will not uphold such a sale, even upon a showing of good faith, where it appears, as in this case, that the attorney, while negotiating for the purchase of the property, was at the same time, and as part of the negotiation, advising the client as to the probable outcome of the litigation concerning it. It is difficult to see how it is possible for an attorney, under such circumstances, to deal with his client at arms-length; for the client's acceptance or rejection of any proposition for a purchase by the attorney, must depend upon the nature of the advice he receives from him touching the pending litigation. In other words, the attorney must, as to an important part of the negotiation, represent both sides; that is, his own private interest, and the opposing interest of his client,—a thing which is manifestly contrary to law and abhorrent to equity. The client must in such a case act upon the attorney's advice and opinion as to the merits of the pending litigation about the property, and by the light of such advice he must fix the price at which he will sell. Even if under some circumstances the property in controversy in a suit may, pending the suit, be sold by the client to the attorney, I am of the opinion that a court of equity ought to hold that such a sale is absolutely void, if the attorney, while negotiating as a purchaser, is called upon to advise the client, as an attorney, as to how far a pending litigation is likely to affect his title to the property, or the value of his interest therein.

It is contrary to the policy of the law, and certainly contrary to the principles of equity, to permit an attorney at law to occupy at the same time and in the same transaction the antagonistic and wholly incompatible position of adviser of his client concerning a pending litigation, threatening the client's title to property, and that of purchaser of such property from the client. If an attorney can deal with his client concerning such property at all, he must, before doing so,—for the time, at least,—divest himself of the character of attorney, so that his former client may deal with him as a stranger. This is not the case when the attorney negotiates with the client as the purchaser of such property, and at the same time advises him as counsel concerning the title to it, or concerning its value, as affected by pending litigation.

3. To sustain a sale from client to attorney, the burden is upon the latter, and he must show that he has done as much to protect the client's interest as he would have done in the case of his client's dealing with a stranger. The court will watch such a transaction with jealousy, and throw on the attorney the burden of proving that the bargain is, generally speaking, as good as any that could have been obtained by due diligence from any other purchaser. An attorney cannot in any case sustain a purchase from his client without showing that he communicated to such client everything necessary for him to form a correct judgment as to the real value of the subject of the purchase, and as to the propriety of selling for the price offered; and neglect of the attorney to inform himself of the state of the facts will not enable him to sustain a purchase from his client for an inadequate consideration. The attorney must show that all the considerations which should have operated to prevent the sale by the client were presented by him with the earnestness of a man who was anxious only for the client's good. It must be made to appear that the client is no worse off than he would have been had he consulted an adviser who had no interest and no selfish end in view. It must appear also that the attorney took such measures to inform himself as to the value of the property offered for sale by the client as are ordinarily taken by persons dealing in such property under like circumstances, and that, being himself thereby informed, he communicated all his information upon the subject to his client. Authorities by which these general rules are established will be found cited in Weeks, Attys. at Law, under the head of "Dealings between Attorney and Client," 450-469, and in 2 White & Tudor, Lead. Cas. in Eq.



(Hare & Wallace's Notes,) part 4, pp. 1216-1225. It does not, in my opinion, appear that respondent Marshall cautioned and advised his client, the complainant, as fully as the law, as above set forth, required.

An attorney who knows nothing of the value of property offered for sale by his client, and is aware that his client is in like ignorance upon that subject, is bound, before advising a sale by the client to a stranger, and *a fortiori* before attempting to purchase from the client himself, to make careful inquiry and to inform himself as fully as possible concerning such value. If a stranger had appeared and opened negotiations with complainant for the purchase of her interest in the mine, and she had applied to Marshall, as her attorney, for advice concerning the sufficiency of the price offered, it would have been his duty, being himself ignorant upon the subject, to advise an investigation by a competent person, as a means of ascertaining the probable or approximate value of the property.

It is true that Marshall had, up to the time when negotiations for a purchase by him commenced, been the attorney of complainant only for the purpose of defending her title, and having no occasion to inquire into the question of the value of the mine; but the moment these negotiations were opened the relation was changed, and it became his duty to use due diligence to ascertain the value of the property as nearly as possible, and to advise complainant or her agent. It was at least his duty to suggest an investigation by the usual method. If he had, without knowledge as to the value of the property, and without suggesting an investigation, advised a sale to a third party at a price which proved to be inadequate, it is clear that he would have failed in his duty, and it is equally clear that he could not purchase under like circumstances. His own ignorance as to the value of the property, so far from being a circumstance in his favor, is a strong reason for holding that he was bound to inform himself, so as to be able to advise his client.

4. I hold further that the respondent Marshall, before consummating his purchase from complainant, was bound to disclose to her, or her agent, the names of all persons interested with him in the purchase, and especially that her partners in the mine were secretly interested as such purchasers. The rule is that the attorney must make a full disclosure of every fact which might influence the decision by the client of the question of the sale. All the presumptions are against the attorney. The court cannot presume that the fact that her partners were secret purchasers with Marshall would have had no

influence upon complainant's mind, if disclosed. If it had been known by her that her copartners wished to purchase part of her interest, and yet did not wish her to know the fact, and had therefore employed Marshall to purchase in his own name for them, it might well have aroused suspicion in her mind, and very probably would have led her to decline to sell, or caused her to employ other counsel, or to institute further inquiry as to the character and value of the property. It has been held that if an attorney can show that he is entitled to purchase property, notwithstanding his character of attorney, yet if, instead of openly purchasing it, he purchases it in the name of a third person without disclosing the fact, the purchase is void. Weeks, Attys. at Law, 463, and cases cited. The same rule must prevail where the attorney, while professing to purchase for himself from his client, really purchases in part for his client's copartners, and suppresses this fact.

5. The parties interested with Marshall in the purchase, and who afterwards took conveyances from him, stand in his shoes, so far as the complainant's rights are concerned. They knew that the relation of attorney and client existed between complainant and Marshall, and they took the chances as to the validity of the latter's purchase. If the sale was void as to him, it is also void as to them, and in that case it is unnecessary to inquire into the allegations or examine the proofs as to misconduct on the part of complainant in connection with the sale in question.

When an attorney purchases from his client in his own name, but in secret trust for third parties, it will not, of course, be insisted that such third parties can be regarded as innocent purchasers, or as entitled to any greater rights or better title than the attorney himself secures.

NOTE. It is a rule, founded both upon common sense and authority, that whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one in the other, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed. Evans, Agency, \*256, 290; 1 Story, Eq. Jur. § 218, 309, *et seq.*; *Tate v. Williamson*, L. R. 2 Ch. 61; *Gillenwaters v. Miller*, 49 Miss. 150. Where a known and defined fiduciary relation exists, the conduct of the party benefited must be such as to sever the connection and to place him in the same circumstances in which a mere stranger would have stood, giving him no advantage, save only whatever

kindness or favor may have arisen out of the relation. *Evans, Agency*, \*256, 290; *Hunter v. Atkins*, 3 M. & K. 113. The sound policy upon which these rules are founded appears nowhere more forcibly than in transactions between attorneys and counsel and their clients; and there are no transactions which courts of equity will scrutinize with more jealousy than dealings between attorneys and their clients, especially where the latter are persons of inferior capacity and inexperienced in business. *Mills v. Mills*, 26 Conn. 213. See, also, *Nesbit v. Lockman*, 34 N. Y. 167; *Hitchings v. Van Brunt*, 38 N. Y. 342; *Downing v. Major*, 2 Dana, 228; *Newman v. Payne*, 2 Ves. 201.

No gratuity or gift to a legal adviser, beyond his fair professional demand, made during the time that he continues to conduct or manage the affairs of the donor, will, as a rule, be permitted to stand, more especially if such gift or gratuity arises immediately out of the subject then under the adviser's conduct or management, and the donor is at the time ignorant of the nature and value of the property so given. *Evans, Agency*, 290; *Middleton v. Welles*, 1 Cox, 112; *Proof v. Hines*, Cas. in Eq. (Talbot,) c. 115; *Brown v. Kennedy*, 33 Beav. 133; S. C. 4 De G., J. & S. 217.

A court of equity will not enforce in favor of a solicitor a security taken from his client, pending a suit, for anything beyond the sum actually due the solicitor. *Mott v. Harrington*, 12 Vt. 199. See, also, *Phillips v. Overton*, 4 Hayw. 291; *Downing v. Major*, 2 Dana, 228; *Greenfield's Estate*, 14 Pa. St. 489; *Leutt v. Sallee*, 3 Port. 115; *Rose v. Mynatt*, 7 Yerg. 30; *Brown v. Bulkley*, 14 N. J. Eq. 451.

So, whenever an attorney is called upon to render services to a client, whether to prepare a deed or will, the law will impute to him a knowledge of all the legal consequences likely to ensue, and requires that he should clearly point out to his client all those consequences from which a benefit may arise to himself from the instrument so prepared; and if he fails to do so he will not be allowed to retain the benefits. *Evans, Agency*, 295; *Watt v. Grove*, 2 Sch. & Lef. 491; *Bulkley v. Wilford*, 2 C. & F. 102.

And, generally, in matters of contract between legal advisers and their clients, the legal advisers may contract with their clients only when the relation is dissolved, or the duties attaching to their position are satisfied. In *Gibson v. Jeyes*, 6 Ves. 266, in which the sale of an annuity by an attorney to his client was set aside, Lord Eldon said: "I do not mean to contradict the cases of trustees buying from their *cestuis que trust*, but the relation between the parties must be changed; that is, the confidence in the party, the trustee or attorney, must be withdrawn. \* \* \* An attorney is not incapable of contracting with his client; a trustee also may deal with his *cestuis que trust*; but the relation must be in some way dissolved, or, if not, the parties must be put so much at arm's length that they agree to take the character of purchaser and vendor."

In the case of a contract of purchase and sale between an attorney and client or principal and agent, or of an agreement giving benefits and advantages to the agent or attorney, proof of actual fraud on the part of the agent or attorney is not necessary in order to set aside the contract; the burden of establishing its perfect fairness, adequacy, and equity is upon the agent or attorney, and, in the absence of such proof, courts of equity treat the case as

one of constructive fraud. *Waters v. Thorn*, 22 Beav. 547; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Condit v. Blackwell*, 22 N. J. Eq. 481; *Banks v. Judah*, 8 Conn. 146; *Central Ins. Co. v. National Ins. Co.* 14 N. Y. 91; *Judah v. Trustees*, 23 Ind. 272; *Huguenin v. Baseley*, 14 Ves. 273; *Lowther v. Lowther*, 13 Ves. 102; *Selsey v. Rhodes*, 2 Sim. & Stu. 41; *Fox v. Mackreth*, 2 Bro. Ch. 400; *Gibson v. Jeyes*, 6 Ves. 278; 1 Story, Eq. Jur. § 311. "An attorney buying from his client can never support it unless he can prove that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger." *Gibson v. Jeyes*, *supra*, per Lord Eldon. See, also, *Howell v. Ransom*, 11 Paige, 538; *Holman v. Loynes*, 4 L. J. Ch. 209; *Gibbs v. Daniel*, 4 Giff. 1, in which last case the purchase by solicitors of a client's equity of redemption was set aside, although another solicitor had been called in, and although the defendants had ceased to act as solicitors just before the contract. The solicitor called in, however, in this case had not done his duty, and the defendants were aware of the fact.

Tested by the above rules, which are grounded both upon sound public policy and authority, there can be no doubt whatever of the entire soundness of the decision in the principal case, which, though not novel in principle, is an interesting application of a salutary and well-settled rule of equity.

*Union College of Law, Chicago, January 7, 1882.*

MARSHALL D. EWELL.

### MANNING v. SAN JACINTO TIN CO.

(*Circuit Court, D. California.* January 3, 1882.)

#### 1. LOCATION OF MEXICAN GRANT—FRAUD—LACHES.

A Mexican land grant, made in 1846, was duly confirmed by the board of land commissioners, acting under the act of congress of March 3, 1857, the confirmation was affirmed by the supreme court of the United States as early as the December term, 1863, and proceedings for locating the grant were, under the decree of confirmation, pending between the United States and the claimant under the grant when the grantors of the complainant located certain mining claims under the act of congress of 1866. Subsequently a patent was issued to the claimant under the grant, embracing the land on which these mining claims were located. This bill was filed against the patentee in September, 1880, alleging that the grant was fraudulently located. *Held*, that the location was *res adjudicata*; further, that the suit was barred by lapse of time.

In Equity.

*M. G. Cobb*, for complainant.

*B. S. Brooks*, for defendant.

SAWYER, C. J. Demurrer to the bill. Briefly stated, it is substantially alleged that between July 26, 1866, and October 27, 1867, the grantors of complainant, without stating who they are or the particulars of their acts, in pursuance of the act of congress of July 26, 1866,

and the customs of miners of the district, located and claimed a large number of tin mines, some 400 claims, as I make the number, in the county of San Bernardino, and worked them in such manner as to secure the several claims and entitle them to patents under the acts of congress,—having expended on each claim over \$1,000, and, in the aggregate, \$175,000 prior to said October 27, 1867,—the lands on which said mines were located being at the time unsurveyed public lands of the United States; that in 1846 Gov. Pio Pico granted to Maria del Rosario Estudillo de Aguirre 11 leagues of land in what is now San Diego county, under the name of “Rancho Sobrante de San Jacinto Viejo y Nievo,” said land being within larger exterior boundaries, and the surplus of other grants, and the survey to be commenced from the boundaries of two other named *ranchos*, situate in a tract of land theretofore known as “San Jacinto;” that in pursuance of the conditions of said grant said Maria entered upon said land, erected a house, and thenceforth to the present time lived thereon, and occupied and enjoyed said *rancho*; that on said October 27, 1867, the president of the United States issued a patent for said grant to said Maria, granting to her the said land granted by said Pio Pico by the name aforesaid, being the surplus remaining within the boundaries of the tract called “San Jacinto,” as shown in the *espediente* of Miguel Pedrorena filed in the application for confirmation before the board of land commissioners over the lands granted to Estudillo and Pedrorena, said patent for a more particular description of the lands referring to a survey and plat annexed to said patent purporting to have been made by the United States surveyor general of California, and approved by him and by the commissioner of the general land-office, and the secretary of the interior; that he is informed and believes, and so *charges* the fact to be, that said land described in said plat and patent is not the land granted by Pio Pico and settled upon and occupied by said Maria, nor any part of the same, nor within the larger exterior boundaries from which said *sobrante* was to be taken; but that said land described in said plat and patent is situate in the county of San Bernardino, more than 6 miles at the nearest point, and more than 20 miles from the furthest point, away from said land; that said land was never surveyed in the field, but said plat was arbitrarily made up in the surveyor general's office without any *data* other than surveys of other *ranchos*, and without any regard to the decree of the court or said *espediente*, for the fraudulent purpose of surreptitiously embracing and securing said large number of tin mines

located and held as aforesaid. The bill then alleges a combination and fraudulent conspiracy between no less than three well-known deputies in the surveyor general's office, the United States surveyor general himself, the commissioner of the general land-office at Washington, and a participation therein by a large number of well-known and prominent citizens and officers, some residing at Washington and in the eastern states, of national reputation, for the purpose of fraudulently locating said grant upon lands beyond the exterior limits of the original grant in order to secure said tin mines; that notice was published, but not for the full time, and thereupon parties in interest other than complainant's grantor filed protests on various grounds, and among them on the ground that the location is not within the grant, and was made without regard to the decree, juridical possession, *expediente*, or the actual possession and occupation by the said Maria; that these objections were overruled by a deputy surveyor general, and the plat reported without the objections to the commissioner of the general land-office; that the commissioner of the general land-office, upon a promise or conveyance of an interest in the grant if he would approve the plat and conceal the facts from the secretary of the interior and the president, did so approve the plat, conceal the facts, and recommend a patent, which was thereupon issued; that the defendant corporation was afterwards organized and the land conveyed to it on consideration of the stock issued to the parties in interest—the said several conspirators—and other parties, with full knowledge of the frauds alleged; that the said land so patented includes the said several tin mines so located and worked by complainant's grantors; that complainant "never knew or heard of the various actings and doings hereinbefore" \* \* \* and in "this bill set forth, or any of them, until within two years last past;" that by reason of the patent to said Maria, complainant's grantor was prevented from applying and did not apply for a patent to said several tin mines, he believing the said patent to be paramount, and not knowing the said alleged fraudulent acts set out; that complainant has not applied for a patent for similar reasons, he supposing the title in defendant under said patent to be paramount till within three years last past, and not knowing the contrary till within two years last past.

The bill further alleges all these fraudulent acts set out to have been performed with the knowledge of defendant and of the said Maria, the grantee and patentee; but alleges no active participation on the part of said Maria, the patentee. Complainant asks that said

patent and subsequent conveyances to defendant be decreed to be void, and the defendant required to convey said several tin mines to complainant.

The patent described in the bill was issued upon a Mexican grant made in 1846, after confirmation by the board of land commissioners, affirmed by the United States courts on appeal, in pursuance of the act of congress of March 3, 1851, "to settle private land claims in the state of California." 9 St. 631. The effect of a patent issued upon such confirmation of a Mexican grant of the kind has been settled by the supreme court of the United States as well as by numerous decisions of the supreme court of California. In *Beard v. Federy*, 3 Wall. 491, the supreme court of the United States states the effect of such a patent in the following language:

"In the first place, the patent is a deed of the United States. As a deed, its operation is that of a quitclaim, or rather of a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the board of land commissioners. In the second place, the patent is a record of the action of the government upon the title of the claimant *as it existed upon the acquisition of the country*. Such acquisition did not affect the rights of the inhabitants to their property. They retained all such rights, and were entitled by the law of nations to protection in them to the same extent as under the former government. The treaty of cession also stipulated for such protection. The obligation to which the United States thus succeeded was, of course, political in its character, and to be discharged in such manner and on such terms as they might judge expedient. By the act of March 3, 1851, they have declared the *manner* and the *terms* on which they will discharge this obligation. They have there established a special tribunal, before which all claims to land are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the government; authorized appeals from the decisions of the tribunal, first to the district and then to the supreme court; and designated officers to survey and measure off the land, when the validity of the claims is finally determined. When informed by the action of its tribunals and officers that a claim asserted is valid, and entitled to recognition, the government acts and issues its patent to the claimant. This instrument is, therefore, record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, *and is correctly located now, so as to embrace the premises as they are surveyed and described*. As against the government *this record*, so long as it remains unvacated, *is conclusive*. And it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent as a record of the government that its security and protection chiefly lie. If

parties asserting interests in lands *acquired since the acquisition of the country could deny and controvert this record*, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, *the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor*. The patentee would find his title recognized in one suit and rejected in another, and if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests, or notions of justice of witnesses and jurymen might suggest. Every fact upon which the decree and patent rest would be open to contestation. *The intruder, resting solely upon his possession*, might insist that the original claim was invalid, or was not properly located, and therefore he could not be disturbed by the patentee. No construction which will lead to such results can be given to the fifteenth section. The term "*third persons*," as there used, *does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property*."

In *Teschemacher v. Thompson*, 18 Cal. 26, the supreme court of California, by Chief Justice Field, says:

"This instrument (the patent) is not only the deed of the United States, but it is a solemn record of the government of its action and judgment with respect to the title of the claimant existing at the date of the cession. By it the sovereign power, which alone could determine the matter, declares that the previous grant was genuine; that the claim under it was valid, and entitled to recognition and confirmation by the law of nations and the stipulations of the treaty; and that the grant was located, or might have been located, by the former government, *and is correctly located by the new government so as to embrace the premises as they are surveyed and described*. While this declaration remains of record, the government itself cannot question its verity, nor can parties claiming through the government by TITLE SUBSEQUENT.

\* \* \* But as the record of the government of the existence and validity of the grant, it establishes the title of the patentees from the date of the grant."

In this case that would be from 1846. And again:

"The 'third persons' against whose interest the action of the government and patent are not conclusive, under the fifteenth section of the act of March, 3, 1851, *are those whose title accrued before the duty of the government and its rights under the treaty attached*." Id. 27.

This view was established in *Leese v. Clark*, 20 Cal. 412, 420, 423, and repeated in numerous other cases. See *Bissell v. Henshaw*, 1 Sawy. 565, and cases cited; and S. C. 18 Wall. 268.

In *Carpentier v. Montgomery*, 13 Wall. 495, the court says that the provision of the fifteenth section of the act of congress cited "was intended to save the rights of third persons not parties to the



*proceeding who might have Spanish or Mexican claims independent of or superior to that presented by the claimant, or the equitable rights of other parties having rightful claims under the title confirmed.*" The complainant has no pretence of a claim under any Spanish or Mexican grant to any part of the premises covered by the patent. His rights, whatever they may be, are alleged to have accrued under the act of congress of 1866, and, consequently, subsequent to that date. The patent is founded on a Mexican grant made in 1846, and its validity is not even questioned. The claim must have been presented for confirmation on or before March 3, 1853, as that was the latest date on which it could have been presented under the act of congress. 9 St. 633, § 13. It was, in fact, confirmed, and the decree of confirmation affirmed by the United States supreme court as early as the December term, 1863. *U. S. v. D'Aguirre*, 1 Wall. 311. The title was therefore settled, and it only remained to locate the grant, long before the rights of complainant had their inception. The proceeding for locating the grant, was, under the decree of confirmation, pending between the United States and the claimant under the grant when the act of congress of 1866 was passed and the mining claims were located, and the genuineness of the grant and its location are *res adjudicata*, under the authorities cited, between the United States and the patentee; and the adjudication is that the grant is "*correctly located*," as well as valid. Cases before cited. The complainant, deriving whatever rights he has from the United States, one of the parties, subsequent to the institution of the proceeding for confirmation, is concluded by the determination. Besides, the grant must have been located either under the act of 1860 or the act of 1864. In either case the proceedings for location were in the nature of proceedings *in rem*. The complainant or his grantor could, under the statute, and should, have objected to the survey and location, and upon a decision against him have appealed to the commissioner of the general land-office, and if the decision was not satisfactory, to the secretary of the interior. He alleges that he did not file objections, but that parties other than himself or his grantors did, and alleged the very grounds now relied upon against the location, which were overruled. Nor does it appear that even they appealed. The complainant, then, has no standing to impeach the record on the ground of having a prior Spanish grant. His rights are subsequent and subject to the grant as located. He is equally without standing on the other ground; he alleges no "equitable rights," or "rightful claim

under the title confirmed;" he does not claim any interest under the Mexican grant, confirmed and patented, or that the patent was issued to the wrong party; he claims that the grant, though valid, and confirmed to the rightful party, was improperly located. He does not, therefore, bring himself within the classes of trusts protected in *Estrada v. Murphy*, 19 Cal. 272, and *Wilson v. Castro*, 31 Cal. 420, or in any other case cited.

But complainant has no standing to impeach the transaction on another ground. He has no apparent title from the United States. His right, whatever it may be, is, at best, only inchoate. It is a mere privilege; a first right to purchase, or pre-emption right under the acts of congress, of which he may avail himself or not as he chooses if he should succeed in vacating the patent. He is not bound to purchase of the government, and may abandon his claim at any moment. Neither he nor his grantor has ever tendered the purchase money to the United States or to defendant, or applied for a patent, and it so appears in the bill, and *non constat* that he ever will do either. He is in no better position as regards title, in his relation to the government, than the parties in *Hutton v. Frisbie*, 37 Cal. 481, and *Frisbie v. Whitney*, 9 Wall. 187. Complainant as yet has no privity with the government in the lands in dispute, and no ground for equitable relief on that score. *Doll v. Meador*, 16 Cal. 295. The United States, if anybody, is the party injured; and the right to vacate the patent for fraud, if any such right exists, is in the United States, and the United States should file the bill to vacate the patent. *Moore v. Robbins*, 96 U. S. 533. Justice can only be done, if at all, upon a bill filed by the United States—the party to the transaction, and the party injured. It is not claimed that the grant confirmed and patented is not valid and properly confirmed; but it is said it is improperly located. The patentee, then, is entitled to 11 leagues of land somewhere. Even upon a bill filed by the government, if the location should be vacated on the ground of frauds practiced by the officers in locating it, with or without the knowledge of the patentee, it is at least doubtful if it could be relocated in the proper place. The ordinary courts have no jurisdiction in the location of grants except in the mode prescribed by the special act of congress on the subject. But suppose the complainant should succeed in charging the defendant as a trustee, on account of fraudulent acts occurring before he had any interest in the matter, and obtain a decree for conveyance of the whole or a part of the land, there could be no relocation on

other lands, for the patent is not vacated, and the proceedings between the patentee and the United States are conclusive. The grantee has got the full amount of land called for in her grant, and she, or her grantee, has been compelled by the court to convey it to a party who has and claims no interest in the grant, legal or equitable. If the complainant can thus obtain a conveyance of a large part of the grant, under similar circumstances the whole can be taken, and the grantee under the Mexican grant would be left without any land, although adjudged to be entitled to 11 leagues. The court cannot do equity on a bill filed by the complainant alone, even if it can in any case. The complainant does not even offer to pay either the patentee or the government for the land. He proposes to take it under a decree of the court, so far as any offer is concerned, without payment of even the small sum required by the statute.

The United States is no party to the bill, and would not be affected by the decree. Clearly the United States is the proper party, and the only proper party, to a suit upon the facts set out in this bill. No decree could be rendered against the defendant in a suit by any other party which could do it justice, or protect and preserve its rights under the Mexican grant, confirmed and patented. The fraud charged, if it exists, certainly deserves the severest punishment; but the law does not punish it in that way. In my judgment, the case does not fall within the principle announced in *Johnson v. Towsley*, 13 Wall. 72, and followed in subsequent cases of a like character. *U. S. v. Flint*, 4 Sawy. 74. The complainant, in my opinion, is not in a position to maintain this bill. The genuineness of the grant and its "*correct location*" were the very questions in issue and determined in the proceedings for confirmation and segregation under the acts of congress, and these questions cannot be re-examined in other tribunals even upon a bill filed by the United States, as was held in *U. S. v. Flint*; *U. S. v. Throckmorton*; and *U. S. v. Carpentier*, 4 Sawy. 42, affirmed in 98 U. S. 61. In *U. S. v. Flint* I had occasion to observe that—

"It is a startling proposition to those who hold patents to lands issued upon confirmed Spanish or Mexican grants, that after 25 years of compulsory litigation, intended, in the language of the various acts of congress, to 'settle titles to land in the state of California,' the holders of all such patents are liable to be called upon to relitigate their claims with the government in the ordinary courts of justice; and that the patent, instead of being conclusive evidence of a 'settlement' of the title—the end of litigation—is but the foundation for the beginning of a new contest to unsettle it, in the tribunals

of the country, *which before had no jurisdiction whatever over the subject-matter*. The very institution of these suits in the name and by the authority of the government, was well calculated to produce, and undoubtedly did produce, a general distrust of such titles, and a wide-spread if not a well-founded alarm." Id. 85-6.

It is a still more "startling proposition," that any citizen at his own option, 13 years after a claim for confirmation of a Mexican grant has been presented to the proper tribunals of the country, and nearly three years after the decree of confirmation has been affirmed by the supreme court of the United States, and pending the survey and final location, and during the ordinary delays incident to issuing a patent, can by a mere entry or trespass upon the lands so claimed, and in litigation between the government and the claimant, *acquire a status* that will enable him to attack and avoid the whole proceedings, and for his own benefit control the title vested by the patent under the grant, in which grant he has no interest. In this case there is no attack on the genuineness of the grant. It is only the location of the grant that is assailed. Upon the inviolability of the location, Mr. Justice Field, with the concurrence of the circuit and district judges in *U. S. v. Flint*, 4 Sawy. 61, said:

"As to the alleged error in the survey of the claim, it need only be observed that the whole subject of surveys upon confirmed grants, except as provided by the act of 1860, which did not embrace this case, was under the control of the land department, and was not subject to the supervision of the courts. Whether the survey conforms to the claim confirmed, or varies from it, is a matter with which the courts have nothing to do; that belongs to a department whose action is not the subject of review by the judiciary in any case, however erroneous. The courts can only examine into the correctness of a survey when, in a controversy between parties, it is alleged that the survey made infringes upon the prior rights of one of them; and can then look into it only so far as may be necessary to protect such rights. They cannot order a new survey, or change that already made."

This was said in a case where the United States was complainant in the bill. *A fortiori* must this be true as to a party having the *status* of the complainant in this bill. In the conclusions stated by *Hoffman, J.*, in *U. S. v. Flint*, 4 Sawy. 84, 85, and especially in 1, 2, 3, and 6, I fully concur. See, also, pages 86, 87. The government, to carry out the provisions of the treaty, committed this whole matter to other and special tribunals, except so far as brought before the ordinary courts for review or appeal. The circuit courts, in the exercise of their general and ordinary jurisdiction, had nothing to do with

it. If this location is declared void in this proceeding, and the defendant be decreed to convey to the complainant, the court has no power to relocate the grant, or remand the case to any other court, board, or officer to relocate it; and although the *government* is satisfied with the location, the grantee of a genuine Mexican grant of 11 leagues will lose the land granted. The proceedings for confirmation and location of the grant having resulted in a patent after a 14 years' litigation, all the tribunals and officers to whom the special jurisdiction over the matter was committed have become *functi officio*.

If this court should now assume jurisdiction to vacate the location, it cannot do equity by giving other lands in place of those taken away. Besides, in the mean time, relying upon this location, other parties may have acquired from the government the title to all other lands upon which it might be located. These patents ought not to be lightly interfered with, at the will or caprice of parties entering upon lands claimed under Mexican grants pending proceedings for confirmation and location, and setting up *recent claims* under general pre-emption laws, or laws authorizing the location and purchase of mines. Whether this case has any feature that brings it within any of the exceptions stated in the last cases cited, it will be time enough to determine when the United States files a bill to vacate the patent on the ground of the frauds charged. In my opinion, the bill presents no ground for equitable relief.

So, also, in my judgment, the suit, in analogy to the statute of limitations of the state, is barred by lapse of time. If complainant is entitled to any relief it is wholly on the ground of fraud. Such suits are barred within three years. Code Civ. Pro. § 338, clause 4. According to the allegations of the bill, the fraud was consummated October 27, 1867. The bill was filed September 8, 1880, nearly 13 years afterwards. The statutory period had, therefore, run more than four times before the filing of the bill, unless the case is within the provision that the cause of action shall "not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." It is attempted to take the case out of the statute by the simple averment "that your orator never heard of the various actings and doings hereinbefore in articles 12, 13, 14, 15, 16, 17, 18, and 19 of this bill set forth, or any of them, until within two years last past." No reason is given for not discovering the fraud. There certainly should be some showing on this point, in view of the public and notorious acts alleged. The bill is singularly barren of allegations of specific facts, though amply full as to general charges

of facts and legal conclusions *on information and belief*. The complainant does not state who his grantor is, or who any one of the other locators of some 400 mining claims described as belonging to him is, nor when they, or any of them, were conveyed to him or his grantor, except that they were conveyed to his grantor before October 27, 1867, and to himself after that date. He mentions no date except the date of the act of congress of 1866, the date of the Mexican grant of 1846, and the patent October 27, 1867. No date of any of the deeds, act of incorporation, or other transactions since October 27, 1867, are given to enable the court to determine, from the facts, whether he ought to have discovered the frauds charged at an earlier date than alleged. For aught that appears, he may have received his conveyance from his grantor the day before he commenced his suit, or he may have received it as early as October 28, 1867. It is not even distinctly averred that his immediate grantor was not fully informed of the acts of fraud, though it appears inferentially in article 22 as a reason for not applying for a patent. But there is no averment at all as to the knowledge of the other parties who must have located the numerous mining claims, and, for aught that appears, might have conveyed to his grantor on the day before the issue of the patent, and with full knowledge of the frauds charged.

The great and substantial facts in the case are all facts of public record, and public proceedings under the law, and of public notoriety. The survey and the patent are of record, and open to everybody's inspection and examination. The incorporation of the defendant is a matter of public record. Notice of the survey appears from the allegations of the bill to have been published under the statute, and to have produced its proper results, as the bill shows upon its face that parties other than complainant's grantor actually appeared in the surveyor general's office as provided by statute, and filed therein objections to the survey on the very fundamental grounds of the fraud stated and relied on in this bill, and that the objections were overruled. Thus, not only the survey and patent, but the very facts charged as the equitable grounds for relief in this bill, were put on the public records of the surveyor general's office, and ruled upon by that office. The facts charged and the rulings, therefore, became public records prior to October 27, 1867, open to the inspection and examination of all; so, also, the fact, if it be a fact, that the grant was located in such a manner that it did not approach within 6 miles at the nearest point, or within 20 miles of some points, of the exterior bounds of the tract within which it could lawfully be located, and did

not include the residence of said Maria, or follow the *expediente*, or decree, was upon record in the survey and in the patent, and must have been known to complainant and his grantor; for it is alleged that the knowledge of the patent, and belief that it was valid, is the reason why they did not apply for patents for their numerous mining claims. It was, therefore, known that the patent covered them; and it would appear from the allegations of the bill, inferentially, if not by direct averment, that plaintiff's grantor was for years in possession of his numerous mines with that knowledge. All these are great, notorious, and public facts *actually known* to complainant's grantor, and presumptively to all mankind; and they are the fundamental facts of the fraud upon which whatever equity there is in this bill rests. They are such facts as must necessarily have put the complainant and his grantor upon inquiry, and have long ago led to the discovery of the frauds. They were facts which they were bound to notice, if they did not do so in fact. They furnish a clue, which, if followed with reasonable diligence, would not require 13 years to lead to the fraudulent acts of the parties charged. Even now the frauds are not positively alleged, but are cautiously charged upon information and belief; and the defendant is called upon by numerous interrogatories to furnish the proof of the frauds alleged. Certainly the known facts were sufficient to arouse suspicion, and enable the complainant or his grantor to file a bill of *discovery on information and belief* long ago. The location of the grant was in the nature of a proceeding *in rem*, and the party had a right under the statute to file objections, and some actually did, alleging these very frauds now charged. These allegations were, therefore, of public record. Parties cannot disregard known facts that lead to frauds affecting their rights, and, in the language of Mr. Justice Bradley, "then claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world *must move on*, and those who claim an interest in persons or things must be charged with knowledge of their *status* and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem*." *Broderick's Will*, 21 Wall. 519. It must not be forgotten not only that the world "moves on," but that in this age and country, and in this part of the country, it moves rapidly. Three years now, and especially in California, is longer, in events and progress, than 20 years some centuries ago, when the statutes of limitation were adopted in England. Parties cannot lie down to sleep upon their

rights, and on waking up many years afterwards find them in the same condition in which they were left. Even Rip Van Winkle, in a slower period and among a slower people, when aroused from his 20 years' slumbers in the recesses of the mountains in the neighborhood of "Sleepy Hollow," found that the world had "moved on." The observations of the chief justice in *Vance v. Burbank*, 101 U. S. 520, are not inappropriate to this case. Among other things, he says, with reference to the facts of that case, "if any was in fact not sent forward, and Scott did not discover the omission until within one year of the time of the commencement of this suit, he must have been grossly neglectful of his own interests." The same may be said of the complainant in this case. If the open, known, notorious facts suggested in the bill, and apparent upon the public records of the county, did not in fact put the complainant and his "grantor" upon inquiry, and lead them to a discovery of the frauds charged, at least sufficiently to afford as good a basis upon which to file a bill of discovery containing general and sweeping charges "upon information and belief" as that upon which the present bill rests, they must, indeed, "have been grossly neglectful of their own interests."

In my judgment, upon both grounds discussed, the bill fails to present any grounds for the relief sought; and it is manifest, under the views expressed, that the bill cannot be truthfully so amended as to obviate the objections. The demurrer to the bill is sustained, and the bill dismissed. Let a decree be entered accordingly.

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HANCOCK v. TOLEDO, PEORIA & WARSAW R. Co.

(District Court N. D. Illinois. January 4, 1882.)

1. RAILROADS—REORGANIZATION—BILL BY CREDITOR.

Where an agreement was entered into between the holders of the mortgage bonds and other creditors of a railroad corporation, after proceedings had been instituted and were pending for the foreclosure of the mortgage liens on its property, whereby provision was made for the appointment of a committee, who were to obtain a decree of foreclosure in the pending suit and purchase the railroad, its rights, privileges, franchises, and property for all the holders of bonds, stocks, and indebtedness of the old company, at the foreclosure sale; for the incorporation of a new company; for the delivery, by the holders, of the bonds, indebtedness, and stock of the company to a third party, subject to the order of the committee; for the conveyance by the committee of its purchase to the new corporation, who should mortgage the same by giving first and second mortgages to secure the issue of a large amount of bonds, and who should issue stock; for giving (1) to the holders of the mortgage bonds of the old company, in place of their old securities, the new bonds, secured by the



two mortgages, at rates fixed by the agreement; (2) to the holders of the floating debt of the old company, in place of their surrendered evidences of indebtedness, second preferred income bonds of the new company at par (these bonds being secured by the second mortgage) to the full amount of their respective debts and interest; (3) to the holders of the first preferred, the second preferred, and the common stock of the old company, when surrendered, stock in the new company to the amount, respectively, of 50 per cent., 30 per cent., and 25 per cent., of the stock of the old company which they had owned: *held*, that a bill by a holder of a part of the floating debt of the old company, charging that this plan of reorganization is fraudulent as against the creditors of the old company, and seeking to have the stock of the new company, provided in the agreement to be issued to the stockholders of the old company, placed in the hands of a receiver and sold, and the proceeds applied to the payment of the plaintiff and such other creditors as should come in and be made parties, will be dismissed for want of equity, on the ground that the plan has a due regard for the interests of all classes of creditors and stockholders, and the bill fails to show that any injustice was intended or has been done to this creditor.

#### In Equity.

*John Gibbons*, for complainant.

*Lyman & Jackson*, for defendant.

BLODGETT, D. J. This is a bill filed by Jonathan Hancock, as a judgment creditor of the Toledo, Peoria & Warsaw Railroad Company, in behalf of himself and all other creditors of that company, against said company, and Morris K. Jessup, Robert C. Martin, Charles E. Whitehead, William L. Putnam, and Henry Hill, a committee of the creditors of said company. The bill, in substance, charges that complainant, on the twenty-third of November, 1875, recovered in the circuit court of Peoria county, in this state, a judgment against the Toledo, Peoria & Warsaw Railroad Company for \$3,835.35; that the railroad of the Toledo, Peoria & Warsaw Railroad Company was heavily encumbered with mortgages and other liens, and that proceedings had been instituted and were pending for the foreclosure of the mortgage liens on the property, and that the property was in the hands of a receiver, appointed by this court under such foreclosure proceedings; that pending these foreclosure proceedings, and on or about the thirteenth day of June, 1877, an agreement was entered into between the holders of the mortgage bonds and other creditors of the corporation, whereby it was provided that defendants Jessup, Martin, Whitehead, Putnam, and Hill should be appointed a purchasing committee; that such committee should obtain a decree of foreclosure in the suit then pending, under which all and singular the railroad, rights, privileges, franchises, and property of the company should be sold, and the same should be purchased at such sale by the committee, for and in behalf of all the holders of bonds, stocks, and indebtedness of the com-

pany; that a new corporation should be organized, under the laws of the state of Illinois, to own, operate, and control such railroad franchises and property, which should bear the name of the Toledo, Peoria & Western Railroad Company; that the holders of the bonds, indebtedness, and stock of the old company should deliver the same to the Farmers' Loan & Trust Company of New York, subject to the order of the committee; that the committee should convey the title to the railroad, its franchises, and appurtenances, so purchased by them, to the new corporation, and the new corporation should make a mortgage on the same to secure 4,500 bonds of \$1,000 each. Also a second mortgage to secure \$3,900,000,—\$2,900,000 of which should be called "*first preferred income bonds*," to be issued in sums of \$1,000 each; \$1,000,000 of said bonds to be called "*second preferred income bonds*," to be issued in sums of \$1,000 each; and that the new corporation should also issue 30,000 shares of stock, of the par value of \$100 per share, making a total of \$3,000,000 stock; that the holders of the mortgage bonds of the old company should receive in place of their old securities the new bonds, secured by the first and second mortgages, at certain rates fixed by the agreement; that the holders of the floating debt of the old company (which means, we assume, the unsecured indebtedness of this company, including this complainant) should receive, on surrender of their evidences of indebtedness, "*second preferred income bonds*" of the new company at par, to the full amount of their respective debts and interest; that the holders of the first preferred stock of the old company should receive, on the surrender of the stock certificates to the committee, stock of the new company to the amount of 50 per cent. of their old stock. Holders of the second preferred stock should receive stock of the new company to the amount of 30 per cent. of the old stock, and holders of the common stock of the old company should receive 25 per cent. in stock of the new company.

In his original bill, complainant stated the substance of this agreement in a very meager and imperfect manner, because, as he charged, the agreement was in the hands of defendants, and he was unable to procure a copy. He has since obtained a copy of the agreement, and filed an amendment to his bill, with a copy of said agreement, so that the agreement itself is now before the court for construction. The bill charges that this scheme or plan of reorganization is fraudulent as against the creditors of the old company, and seeks to have the stock of the new company, provided in the agreement to be issued to the stockholders of the old company, placed in the hands of a receiver and sold, and the proceeds applied to the payment of complain-

ant's judgment, and that of such other creditors as shall come in and be made parties thereto.

The solicitor for complainant insists that he makes just such a case here as was shown in *Railroad Co. v. Howard*, 7 Wall. 392. That case involved a contract made under circumstances similar to this, between the bondholders and stockholders of the Mississippi & Missouri Railroad Company of Iowa, whereby the road of the company was to be sold under a decree of foreclosure to be procured, and bid in by a committee for a fixed sum, \$5,500,000, which was to be distributed among the bondholders and stockholders in such proportions that the stockholders should receive 16 per cent. of the par value of their stock, either in money or bonds. This agreement was attacked by the holders of certain unsecured indebtedness of the company, on the ground that it was fraudulent as against them.

The supreme court held that plan of reorganization void as against the unsecured creditors, because it made no provision for the payment of the unsecured creditors, saying:

"Mortgage bondholders had a lien upon the property of the corporation embraced in their mortgages, and the corporation having neglected or refused to pay the bonds, they had a right to institute proceedings to foreclose the mortgages, but the equity of redemption remained in the corporation. Subject to their lien, the property of the railroad was in the mortgagors, and whatever interest remained after the lien of the mortgages was discharged belonged to the corporation; and as the property of the corporation when the bonds were discharged, it became a fund in trust for the benefit of their creditors. Holders of bonds secured by mortgage, as in this case, may exact the whole amount of the bonds, principal and interest, or they may, if they see fit, accept a percentage as a compromise in full discharge of their respective claims; but whenever their lien is legally discharged, the property embraced in the mortgage, or whatever remains of it, belongs to the corporation."

It will be seen that while the Mississippi & Missouri Railroad Company was largely indebted to certain unsecured creditors, no provision was made under the scheme of reorganization for any payment or security to the unsecured creditors. The plan contemplated a complete absorption into the purchasing committee, or their successors, of the entire property of the company, free from all liens and liability for the debts of the old company, but in no manner contemplated that the holders of unsecured indebtedness were to be paid in full or in part, or in anywise provided for; while the stockholders, who only in equity held their interest, subject to the debts of the company, were to have about \$550,000 divided among them.

Here, however, express provision is made for the holders of all the

floating debt by giving them, in lieu of and substitution for their evidences of debt against the old company, second preferred income bonds of the new company equal to the amount of such floating debt and interest. This income bond is, by the terms of agreement, a higher grade of security than the stock of the old company; that is, the stockholders get no dividend until the interest on these bonds is all paid. The stockholders are placed behind the holders of these bonds, and the plan seems to fairly contemplate the protection of all classes of creditors of the old company in the equitable order of their priority. It was the evident purpose of the parties to this agreement to place these floating-debt holders in at least as good a relation to the new company as they bore to the old company. They got for their unsecured indebtedness something which at least bears the semblance of a security. It was a second-mortgage bond. No complaint is made of anything inequitable in the provision by which the holders of the mortgage debt should be paid in full in the manner provided in the agreement; nor is there any suggestion that there was any fraudulent collusion between the bondholders and stockholders to defraud the unsecured creditors.

It would seem almost obvious, from a statement of the amount of bonded and unsecured indebtedness of this old company, that it could not have been anticipated that this railroad property would or could have been sold for cash; or, if a cash sale had been insisted upon, it would only have partly paid the holders of the first-mortgage bonds. The plan adopted had what seems to have been a due and equitable regard for the interests of all classes of creditors and stockholders, and it does not seem that upon the statements in this bill any injustice was intended or has been done to this creditor. He undoubtedly has been offered much more than he could have got had the holders of the secured indebtedness insisted upon their full payment, as they would seem to have had the right to do. If this bill had shown that this creditor had accepted the provision made for him under the scheme or plan of reorganization, or had accepted the income bonds he was entitled to receive, and there was still a balance of his debt left unliquidated, he might, under the authority of the case which has been referred to, have had a right to call upon the stockholders to surrender the stock which it was provided they should receive as a part of this scheme. But it is not necessary to discuss that; and I refer to it only for the purpose of showing that he makes no such statement. He does not show he has accepted the provision which was made for him, and has come into the scheme for the purpose of

obtaining payment, as the other creditors of this corporation did, and as he might have done. If he had exhausted his remedy he might have had a different standing with reference to the stockholders. It is true, the contract provides that all those who come into this scheme shall contribute ratably to the expenses necessary to complete this plan of reorganization. This does not seem inequitable, but on the contrary just and equitable between the parties. All classes of the creditors of this company seem involved in a common misfortune, and it seems to me but right that they should share in the expenses of a plan which had for its purpose the benefit of all.

The bill is therefore dismissed for want of equity.

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CRESCENT CITY LIVE-STOCK LANDING & SLAUGHTER-HOUSE Co.  
v. BUTCHERS' UNION LIVE-STOCK LANDING &  
SLAUGHTER-HOUSE Co.\*

(Circuit Court, E. D. Louisiana. December 30, 1881.)

1. CONSTITUTIONAL LAW.

The validity of article 248 of the constitution of Louisiana conceded; the validity of article 258 of same constitution doubted; the effect of both on the charter of plaintiff considered.

2. VESTED RIGHTS—POLICE POWER.

When a legislature has granted an exclusive right, and that organ of the government in which is vested the police power with reference to that subject-matter sanctions the exercise of the right as harmless, there exists no power, either in the legislature or the people, to abrogate it.

Application for an Injunction *pendente lite*.

The facts are stated in the opinion of the district judge.

*Thos. J. Semmes* and *Robert Mott*, for complainant.

*B. R. Forman*, for defendant.

PARDEE, C. J. We follow the decision of the supreme court of the state of Louisiana in the case of *Slaughter-house Co. v. City of New Orleans*, as reported in 33 La. Ann. 934, in these propositions:

(1) The charter of complainant, act No. 118 of 1869, Louisiana Laws, constitutes a contract.

(2) That the said charter contains monopoly features.

(3) That so far as said act or charter rests upon delegated police power of the state, it may be repealed or impaired by constitutional or legislative authority, without infringing on the constitution of the United States.

\*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

We concede the validity of article 248\* of the Louisiana constitution, as delegating the regulation of slaughter-houses to the various municipal authorities. We doubt the validity of article 258† of the same constitution, so far as any retroactive effect is claimed for it, and we deny that said article is or pretends to be an exercise of the police power. And we deny the efficiency of any of the ordinances of the city of New Orleans—as shown in this case—to in anywise deprive complainant of the rights given by his contract and charter, or to convey any of said rights or privileges to defendant.‡

\*Section 248 of the constitution of Louisiana, of 1879, provides as follows:

“The police juries of the several parishes, and the constituted authorities of all incorporated municipalities of the state, shall alone have the power of regulating the slaughtering of cattle, and other live stock, within their respective limits: provided, no monopoly or exclusive privilege shall exist in this state, nor such business be restricted to the land or houses of any individual or corporation: provided, the ordinances designating the places for slaughtering shall obtain the concurrent approval of the board of health, or other sanitary organization.”

†Section 258 of the constitution of Louisiana, of 1879, provides as follows:

“All rights, actions, prosecutions, claims, and contracts, as well of individuals as of bodies corporate, and all laws in force at the time of the adoption of this constitution, and not inconsistent therewith, shall continue as if the said constitution had not been adopted. But the monopoly features in the charter of any corporation now existing in the state, save such as may be contained in the charter of railroad companies, are hereby abolished.”

‡The charter of plaintiff provided, *inter alia*, (acts of Louisiana of 1869, pp. 169 *et seq.*.)

“Sec. 3. Be it further enacted, etc., that the said company or corporation is hereby authorized to establish and erect, at its own expense, at any point or place on the east bank of the Mississippi river, within the parish of St. Bernard; or in the corporate limits of the city of New Orleans, below the United States barracks; or at any point or place on the west bank of the Mississippi river, below the present depot of the New Orleans, Opelousas & Great Western Railroad Company,—wharves, stables, sheds, yards, and buildings necessary to land, stable, shelter, protect, and preserve all kinds of horses, mules, cattle, and other animals, from and after the time such buildings, yards, etc., are ready and complete for business, and notice thereof is given in the official journal of the state; and the said Crescent City Live-Stock Landing & Slaughter-House Company shall have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privileges granted by the provisions of this act; and cattle and other animals destined for sale or slaughter in the city of New Orleans, or its environs, shall be landed at the live-stock landings and yards of said company, and shall be yarded, sheltered, and protected, if necessary, by said company or corporation; and said company or corporation shall be entitled to have and receive for each, etc.

\* \* \* \* \*

“Sec. 10. Be it further enacted, etc., that at the expiration of 25 years from and after the passage of this act, (March 8, 1869,) the privileges herein granted shall expire.”

In all the cases cited from the supreme court of the United States, (*Slaughter-house Cases*, 16 Wall. 57; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Fertilizing Co. v. Hyde Park*, Id. 677; *Stone v. Mississippi*, 101 U. S. 814,) bearing on the exercise of police power, there is no decision, no argument even, justifying the impairment of the obligations of a contract, by the aid of the police power, in order to transfer property rights or privileges from one individual to another, or from one corporation to another.

In the case of *Beer Co. v. Massachusetts*, 97 U. S. 25, a prohibitory law against the sale of malt liquors was maintained, notwithstanding complainant's charter.

In the case of *Fertilizing Co. v. Hyde Park*, 97 U. S. 677, a nuisance was allowed to be suppressed by village ordinance, notwithstanding a charter from the state to carry on a fertilizing business at that very place.

In *Stone v. Mississippi*, 101 U. S. 814, a penal law prohibiting lotteries was upheld, notwithstanding a charter from the state to carry on the lottery business.

In each of these cases the right of a state, by exercise of the police power, to suppress a business otherwise legitimate, was recognized, although such business existed under chartered rights previously acquired.

But the proposition of the defendant goes much further, and it is, that, under the police power of the state, by virtue of articles 248 and 258 of the state constitution, the contract privileges given by act No. 118, 1869, to the complainant, are not repealed nor suppressed nor policed, but *distributed*, and that, therefore, the defendant may lawfully take up the rights so by police power taken from complainant. And it is to be particularly borne in mind that neither the place, nor the manner, nor the charges, nor the inspection, nor the business of complainant are in any way obnoxious. There is no nuisance, no vice, no illegality tainting the conduct of complainant's business, and consequently there is no question of public health, manners, or morals involved.

Under these circumstances, and with this view of the case, we incline to the opinion that defendant's pretensions cannot be sheltered under a claimed exercise of the police power, and that if articles 248 and 258 of the constitution of Louisiana, and the city ordinances thereunder, are to have the effect claimed by defendant, then it would amount to an impairment of the obligations of complainant's contract

with the state, and come within the inhibition of section 10, art. 1, of the constitution of the United States.

Inclining to these views, and considering the state of the litigation between the parties, (as stated in the argument,) we think an injunction *pendente lite* should issue, to the end that the questions involved may be more fully argued and investigated, and the respective rights of the parties fully protected. A bond to cover damages, if any result, should be given. It is therefore ordered that an injunction pending this suit issue as prayed for, on complainant giving bond in the sum of \$——, conditioned according to law.

BILLINGS, D. J., (*concurring.*) I concur in the conclusion reached by the circuit judge. The case finds that in the year 1869 the complainant received from the legislature of Louisiana a grant of a corporate franchise, which was exclusive, to slaughter animals at a place designated in the charter for a period of 25 years; that the constitution of 1879 (articles 248 and 258) attempted to abolish the monopoly features, or the exclusiveness, of all corporations except those contained in the charters of railroads; that the same constitution withdrew from the legislature the power to regulate the slaughtering of animals in cities and parishes, and conferred it upon the municipal and parochial authorities, in conjunction with the local boards of health; that neither the legislature nor the proper municipal authority has ever declared that either the place or manner of conducting complainant's business was opposed to the public good, but that, on the contrary, the municipal and health officers have designated the *locus in quo* of the complainant's business as within a district where said business may be carried on, and have prescribed regulations for the conduct of the business of slaughtering animals, none of which are being violated by complainant.

This case does not fall within the principle that legislative grants of a certain nature may be constitutionally recalled, even where that principle has been pushed to its extreme limit. That principle is that legislatures are clothed by the people with limited power to bind their successors in any matter of public police, and therefore the courts have held that such a grant could not stand in the way of the subsequent action of the police power. The extremist principle, when applied to this case, would lead to the conclusion that if the proper municipal and health boards, in the exercise of the police power delegated to them, declared that complainant's business, either in its



location or its methods, was injurious to the public health, they could regulate, or, if in their judgment the public health required, abolish it; that the grant is voidable and not void; that it is valid until the power, be it the legislature or the municipal officers in which is vested the function to deal with sanitary matters, finds it to be injurious. The conclusion is that where, as here, the proper authorities find the place and manner of conducting the complainant's business to be harmless, there exists no power, either in the legislature or the people of the state, to abate it. So, according to the cases which have gone the furthest, so long as the place and manner of the complainant's slaughtering of animals are sanctioned by that organ of the government of the state in which is vested the police power with reference to that subject-matter, the action of the legislature in making the grant stands for that of the people of the state, and the exclusiveness of the right granted is protected by article 1, § 10, of the constitution of the United States. *The Bridge Proprietors v. The Hoboken Co.* 1 Wall. 116.

# BREWIS v. CITY OF DULUTH AND VILLAGE OF DULUTH.

(Circuit Court, D. Minnesota. December 13, 1881.)

## 1. EQUITABLE RELIEF—TWO MUNICIPAL CORPORATIONS FORMED OUT OF ONE—CREDITOR'S BILL.

The rights of creditors of the city of Duluth considered, with reference to the act of the legislature of the state of Minnesota, by which the village of Duluth was created out of a part of the territory of the city of Duluth, and the indebtedness of the city apportioned between them, and the allegations of fact in plaintiff's bill, and *held*, that such act—such allegations being true—interferes with the rights of creditors, and that a bill in equity will lie, by a creditor of the city at the time the act was passed, against the village, to enforce the payment of its proportionate share of the indebtedness; the share of the indebtedness for which each is liable being in the ratio of the taxable property of one to that of the other.

In Equity. Demurrer to bill of complaint.

This suit is brought against the city of Duluth and the village of Duluth to recover the coupons overdue upon bonds of the city of Duluth, in this district. A demurrer is interposed by the village of Duluth.

*Gilman & Clough*, for demurrer.

*Williams & Davidson*, contra.

NELSON, D. J. The complainant is the owner of certain bonds issued under an act of the legislature of Minnesota, approved March

8, 1873, authorizing the city of Duluth to fund the debt previously incurred for improving the harbor, and for other purposes. The bonds were payable in not less than 20 nor more than 30 years from the date of their issue, and bear interest at the rate of 7 per cent. per annum, payable semi-annually in the city of New York. The complainant became a *bona fide* holder of the bonds and coupons previous to 1875.

It appears that on February 23, 1877, the legislature of the state of Minnesota created the village of Duluth out of a part of the territory of the city of Duluth, under an act entitled "An act to create the village of Duluth, \* \* \* and to apportion the debts of the city of Duluth between itself and the village of Duluth, and provide for the payment thereof."

This act carved the village out of the city limits, taking and embracing in the village all the business part of the city and business houses, the harbor, railroad depots and tracks, nearly all the dwelling-houses, all the population except about 100 inhabitants, and nineteen-twentieths of all the taxable property; and no provision was made for the payment of the debts of the city by the village unless creditors would accede to the terms imposed by the legislature as hereinafter stated. It also appears that on February 28, 1877, an act was passed entitled "An act to amend the act entitled an act to incorporate the city of Duluth," approved March 5, 1870, and this act declared that the service of all summons and process in suits against the city of Duluth should be made on the mayor of the city, and that service made on any other officer should not be valid against the city. It also provided that the term of the office of mayor should cease on the following April, 1877, and no provision was made for the election of a successor or for filling a vacancy; that no taxes should be levied without the affirmative vote of all, to-wit, four aldermen; and since the passage of the act there have never been four aldermen in the city qualified to act. There is a section authorizing the levy of taxes by the county of St. Louis, in which the city is situated, but all taxes thus levied and collected must be paid to the village of Duluth.

On the facts admitted by the demurrer the complainant is entitled to relief. The legislature undoubtedly had the right to create the village of Duluth out of the territory of the city, and, as between the city and the village, apportion the existing indebtedness; but when the corporation which created the debt is shorn of its population and taxable property to such an extent that there is no reasonable expectation of its meeting the present indebtedness, and it is unable so to

do, the creditors, at least, can enforce a proportionate share of their obligations against the two corporations carved out of one. Both are liable to the extent of the property set off to each respectively.

The debt of the city at the time the village was created by act of February 23, 1877, was about \$400,000, and the act creating the village of Duluth authorized an apportionment of the debts as follows:

Section 3, in substance, provides that after one year from February 23, 1877, the village shall become jointly liable with the city on all bonds issued prior to the passage of this act, unless it shall within the year take up and cancel, as hereinafter provided, \$218,000 of the evidence of indebtedness outstanding of the city, provided that interest to January 1, 1878, on all bonds and maturing coupons shall be treated and regarded as part of said evidence of outstanding indebtedness.

Section 4 enacts that not more than \$100,000 of village 6 percent. 30-year bonds shall be issued for taking up outstanding bonds and orders of the city of Duluth to the amount of \$218,000, and interest thereon to January 1, 1870. These bonds are to be placed in the possession of the judge of the Eleventh judicial district of the state of Minnesota.

Section 5 enacts that persons holding bonds, matured coupons, or orders of the city of Duluth prior to the passage of this act may surrender the same to the judge of the district court for exchange for the bonds of the village of Duluth; and whenever \$218,000 has been surrendered, the judge shall issue to the persons so surrendering, the bonds of the village of Duluth to one-fourth of the amount so surrendered, and on the delivery of the village bonds shall cancel the amount of city bonds received in exchange.

Other sections provide for annexation of more land from the city limits.

This statute interferes with the rights of creditors. The obligations of a municipal corporation are not affected, although the name may be changed and the territory increased or diminished, if the new organization embraces substantially the same territory and the same inhabitants. It may be true that generally creditors, to obtain relief, must look exclusively to the corporation creating the debt; but when a state of facts exists as disclosed here, and the old corporation is diminished in population, wealth, and territory to the extent admitted, it would be a mockery of justice to withhold the relief asked,

Without at this time considering more fully the question presented, whether the several acts of February 25, 1877, and February 28, 1878, impair the obligations of the contract between the city of Duluth and its creditors, it is clear to my mind that the bill on its face contains sufficient equity and calls for an answer.

The demurrer is overruled, and the defendant can have until January rule-day to answer.

MCCRARY, C. J., concurred.

NOTE. Consult 92 U. S. 307; 93 U. S. 266; 100 U. S. 514; *O'Connor v. Memphis*, 18 Cent. Law. J. 150; 7 Biss. 146.

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### DEMOND v. CRARY.

(Circuit Court, E. D. New York. January 11, 1882.)

1. REV. ST. NEW YORK, VOL. 1, p. 738, § 139, CONSTRUED—MORTGAGES.

Revised Statutes of New York, vol. 1, p. 738, § 139, which declares that no mortgage shall be construed as implying a covenant for the payment of the money, and that if there be no express covenant for such payment in the mortgage, and no bond or other separate instrument to secure payment, the remedy of the mortgage shall be confined to the land, construed not to mean that, in the absence of an express covenant in the mortgage for the payment of the debt, and any bond or other separate instrument to secure payment, a personal action cannot be maintained for a mortgage debt when proved by competent evidence, whether in writing or parol; but that an action for a debt secured by mortgage cannot be sustained merely by the production of the mortgage, when it contains no express covenant to pay the debt.

Motion to Set Aside a Verdict and for a New Trial.

*Johnson & Lamb*, for plaintiff.

*S. W. Holcomb*, for defendant.

WHEELER, D. J. This cause has been heard upon the motion of the defendant to set aside the verdict for the plaintiff, and for a new trial. The plaintiff was surety for the defendant on an appeal bond in the state courts of New York. The judgment appealed from was affirmed and the condition of the bond broken. The plaintiff paid the judgment, and the defendant, by a deed absolute on its face, conveyed an interest in some lands and houses situated in New York to the plaintiff to secure repayment of the sum paid. The verdict is for the amount due of that sum. The defendant claimed at the trial that this conveyance was in reality a mortgage, and that the plaintiff could not recover for this money on account of a provision in the statutes of New York—vol. 1, p. 738, § 139; vol 3, (6th Ed.) p. 1119, §

160—which declares that no mortgage shall be construed as implying a covenant for the payment of the money; and that if there be no express covenant for such payment in the mortgage, and no bond or other separate instrument to secure payment, the remedy of the mortgagee shall be confined to the land. The evidence was equivocal as to whether the plaintiff paid the judgment compulsorily, in discharge of his own obligation, and took the security afterwards, or furnished it by way of a voluntary loan to the defendant, made upon that security; and the court submitted that question to the jury, with directions to return a verdict for the plaintiff if they found the former, and for the defendant if they found the latter, to be the case. The decision of the motion depends upon the correctness of this instruction. The diligence of counsel has brought to notice but very few cases bearing upon the construction of this statute. The statute appears to have been designed to remove doubts of construction, and to declare the law, rather than to restrict rights; and this seems to be the view taken of it by Chancellor Kent. There had been cases in which it had been held that the condition in a mortgage, if the mortgagor shall pay, etc., implied a covenant that the debt existed, and that the mortgagor would pay, making the mortgage deed not only proof of the mortgage but proof of the debt also, although it contained no express promise or covenant to pay the debt. *King v. King*, 3 P. Wms. 358. And in *Ancaster v. Mayer*, 1 Bro. Ch. Cas. 454, at 464, Lord Chancellor Thurlow had said:

“A man mortgages his estate without covenant, yet because the money was borrowed the mortgagee becomes a simple contract creditor, and in that case the mortgage is a collateral security, and if there is a bond or a covenant, then there is a collateral security of a higher species, but no higher by means of the mortgage merely.”

In the text of Kent's Commentaries it was laid down that—

“The covenant must be an express one, for no action of covenant will lie on the proviso or condition in the mortgage; and the remedy of the mortgagee, for non-payment of the money according to the proviso, would seem to be confined to the land, where the mortgage is without any express covenant or separate instrument.”

In a note to the third edition, referring to this statement, he said: “This doctrine has been made a statute provision in the New York Revised Statutes,” and referred to this statute. Then he referred to the intimation of Lord Thurlow, and added: “But the statute of New York has disregarded the suggestion.”

In the fifth edition he added to the note: "And it is in opposition to the current of authority and reason of the thing." Vol. 4, p. 145. In all this the effect of a transaction of loaning money and taking a mortgage, without more, seems to be what is spoken of. The statute seems to be aimed against sustaining an action for a debt secured by mortgage merely by the production of the mortgage, when it contains no express covenant to pay the debt. It sets out with the declaration that no mortgage shall be construed as implying a covenant, etc., and what follows seems to be intended to carry out that principle. That a personal action can be maintained for a mortgage debt when proved by competent evidence, whether in writing or by parol, cannot be questioned.

In *Conway v. Alexander*, 7 Cranch, 218, Mr. Chief Justice Marshall said: "It is, therefore, a necessary ingredient in a mortgage that the mortgagee should have a remedy against the person of the debtor." And in *Russell v. Southard*, 12 How. 139, Mr. Justice Curtis said: "In such a case it is settled that an action of *assumpsit* will lie." In a case like this the deed could not be shown to be a mortgage without showing the debt; showing it to be security would involve showing what it secured. Still the statute is understood to apply as well to an absolute deed made for security, as to a conditional one made for security. Each is understood to be a mortgage. *Hone v. Fisher*, 2 Barb. Ch. 559. But here is not the mere transaction of loaning money and taking either a technical mortgage or an absolute deed for security. When the plaintiff paid the money for the defendant, as his surety, the law raised the promise at once from the defendant to repay it; and a cause of action accrued for it immediately, and that is the cause of action in suit. The proof of it consists in transactions entirely separate from the deed. The conveyance was not taken in satisfaction of this pre-existing debt; neither was it any consideration for the debt. Nothing rests upon any implication in the deed. The statute was not intended to take away perfected causes of action, which could be proved without violating it, and the proof of this cause of action is not touched by it. This view is the more satisfactory because upholding the suit for the plaintiff will not enable him to collect any more than his just due, however ample the security may be; and if the suit failed, and the security should be inadequate, he might, for want of ability to maintain the suit, lose some part of what justly belongs to him.

The motion must be denied, and judgment be entered on the verdict.

MARCH, PRICE & Co. v. CLARK.\*

(Circuit Court, S. D. Georgia, W. D. January 17, 1882.)

1. NEGOTIABLE INSTRUMENTS—MARRIED WOMEN—INNOCENT PURCHASER.

A negotiable instrument executed by a married woman in a state, the statute of which provides that any contract by the wife to pay the debts of her husband is void, is subject to the defence that the consideration thereof was the payment of her husband's debt, although transferred to an innocent purchaser before maturity, and although the instrument itself recites that it was given for advances to her.

March, Price & Co. sued Mrs. E. A. Clark on the following paper:

\$548.

ALBANY, GA., May 7, 1880.

On fifteenth October next, pay to myself, or order, five hundred and forty-eight dollars, for cash furnished me to make my crops; this to be an advance under my mortgage to you of the twenty-third day of January, 1880. Homestead and other exemptions and protest waived.

[Signed]

E. A. CLARK.

To Welch & Bacon, Factors, Warehouse and Commission Merchants, Albany, Georgia.

The draft was indorsed by said E. A. Clark, and accepted by Welch & Bacon, who assigned the same to the plaintiffs, before maturity.

The defendant pleaded that the draft was given by defendant "to pay a draft drawn by E. M. Clark, who is the husband of defendant, and having been thus given, and not for any debt of her own, she is not liable under the law to pay the same or any part thereof."

When the defendant offered evidence in support of the foregoing plea, counsel for plaintiffs objected, on the ground that the draft had been transferred to plaintiffs, before maturity, for value, and that such defence, however good against Welch & Bacon, could not avail against *bona fide* holders. This was the main question of law in the case, and the ruling of the court thereon is stated below. The evidence was conflicting as to whether the consideration of the draft was goods furnished by Welch & Bacon for the benefit of the husband of defendant or herself; and this question the court submitted to the jury as a question of fact.

ERSKINE, D. J. The defendant, Mrs. E. A. Clark, appears on the paper sued upon as drawer and indorser. Welch & Bacon are primarily liable; she is only secondarily liable. It is a conceded fact in the case that the defendant is a married woman.

\*Reported by W. B. Hill, Esq., of the Macon bar.  
v.9,no.13—48

The statute of Georgia (Code of 1873, § 1783) is as follows:

"The wife is a *feme sole* as to her separate estate, unless controlled by the settlement. Every restriction upon her power in it must be complied with; but while the wife may contract, *she cannot bind her separate estate by any contract of suretyship, nor by any assumption of the debts of her husband; and any sale of her separate estate, made to a creditor of her husband in extinguishment of his debts, shall be absolutely void.*"

Under this statute, if this draft was made to pay a debt of defendant's husband, the draft is not merely voidable, but void. It is a contract inhibited by the statutes of this state.

It was contended for the plaintiffs that the defendant was estopped from denying the recital therein, that it was furnished her to make her crops, etc., especially as against *bona fide* holders of the paper. If the contract were not void under the statute cited the court might so hold, but in view of the construction now adopted of that statute, the court is compelled to decide that defendant may offer evidence of the consideration as alleged in the plea. This being a Georgia contract must be governed by the law of Georgia; and the consequences above stated result from the provision of the case.

The court will admit the evidence and submit the disputed questions of fact to the jury.

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### *In re* CARY, Bankrupt.

(District Court, S. D. New York. December 30, 1881.)

#### 1. DEPOSITIONS—SIGNATURE—STENOGRAPHER'S NOTES.

Upon an order of reference to a register in bankruptcy to take proofs, the depositions of witnesses taken by a stenographer, before a register, and afterwards reduced to *long-hand*, will be suppressed if not read to and signed by the witness, according to general order 10, after they are written out, though the witness' subsequent attendance for that purpose could not be procured.

The reference in section 5003 to the practice in equity is controlled by general order No. 10, adopted by section 4990.

In Bankruptcy.

Henry C. Beach, for bankrupt.

Philo Chase, for creditors.

Brown, D. J. Upon a petition of the bankrupt for an order directing that certain persons be punished for contempt in disobeying a prior order of this court, an order of reference was made to the register to report the facts pertaining to the alleged contempt. A great mass of testimony is submitted, annexed to the register's report,



among which is that of Henry E. Hopkins, a witness called by the bankrupt, examined on his behalf, and also cross-examined. The deposition of Hopkins, as appears by additional affidavits submitted in respect thereto, was first taken by a stenographer, who furnished to the counsel for the bankrupt, "some considerable time afterwards," a long-hand copy of his notes of the testimony; and counsel thereupon endeavored to obtain the further attendance of the witness for the purpose of having this transcript of the notes read over and subscribed by the witness in the presence of the register, but the witness could not then be found, having, as it is alleged, left the state, and his whereabouts being unknown. The stenographer submits an affidavit that the long-hand copy is a correct transcript of the notes taken by him, and the register certifies that the witness was sworn, examined, and cross-examined before him. Counsel for the respondent now moves, before the hearing of the order to show cause upon the referee's report, for an order, in effect, suppressing the testimony of Hopkins, on the ground that it has never been read to or subscribed by him.

Section 5003 of the Revised Statutes prescribes that testimony is to be given "in the same manner as in suits in equity in the circuit court." Section 5006 authorizes the court to punish a witness for contempt "for refusing or declining to swear to or sign his examination." General order No. 10 provides that witnesses "shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law;" and that depositions upon such examination "shall be taken down in writing by or under the direction of the register, and, when completed, shall be read over to the witness, and signed by him in the presence of the register." By section 4990 the then existing general orders of the supreme court were readopted.

The mode of giving testimony in suits in equity in the circuit court, referred to in section 5003, is substantially the same as that directed by order No. 10, with a slight variation. The general rule in equity promulgated at the December term, 1861, provides that the depositions taken upon oral examination, "when completed, shall be read over to the witness and signed by him in the presence of the parties or counsel, or such of them as may attend; provided, if the witness shall refuse to sign the deposition, then the examiner shall sign the same." Under this rule the signature of the witness in equity suits in the United States courts is not an indispensable condition to his deposition being received.

In *Moulson v. Hargrave*, 1 S. & R. 201, unsigned depositions were received, and the court stated that it had been decided by that court, and also by the circuit court of the United States for that district, that the signatures of witnesses were not necessary. But, in such cases, the testimony is taken by the examiner, a sworn officer of the court, and its correctness is authenticated by him. See, also, *Mobley v. Hamit*, 1 A. K. Marsh. 590; *Rutherford v. Nelson*, 1 Hayw. 105; *Wiggins v. Pryor*, 3 Porter, 430.

The practice in the English chancery was settled by the early case of *Copeland v. Stanton*, 1 P. Wms. 414, where the depositions unsigned, because of the sudden death of the witness, were not admitted, for the reason, as the court say, that "the witness was at liberty to amend or alter anything, after which he signs them, and then, but not before, the examinations are complete and good evidence." See *Smith*, Ch. Pr. 519. If the direct examination is signed, and thus complete, so far as it goes, the loss of opportunity to cross-examine the witness, by his death or other inevitable accident, is not sufficient to exclude the deposition, and it may be received for what it is worth. *Nolan v. Shannon*, 1 Molloy, 157; *Arundel v. Arundel*, 1 Chan. 90; *Gass v. Stinson*, 3 Sumn. 98.

The rule requiring depositions to be read to the witness and subscribed by him, adopted by general order No. 10, which was also a statutory requirement in the chancery practice of this state, (2 Rev. St. \*181, § 89,) was manifestly intended to secure accuracy and prevent mistakes and abuses in testimony taken out of court. It is not necessary to hold that in every case whatsoever, and without regard to circumstances, each of the directions of rule 10 must be inflexibly complied with. The rule does not declare that the testimony shall be rejected in case of a defect in any one of the prescribed particulars, and circumstances may arise where the literal enforcement of the rule would defeat its real purpose. But the rule must be enforced wherever the failure to procure the signature has arisen from any laches on the part of the parties calling the witness, and when the ordinary guaranties of the correctness of the testimony are wanting. In this case none of those guaranties are supplied. The testimony was not taken by the register or by any officer of the court, nor, so far as appears, by any person acting under him. It has not been seen or read by the witness, and its correctness is not certified by the register, and, from the circumstances of the case, necessarily cannot be so certified by him. In legal effect it is nothing more than what the stenographer by his affidavit swears he heard the

witness say; i. e., it is mere hearsay. Mistakes of more or less importance constantly occur in the notes of stenographers, even of those who are most experienced and trustworthy; and parties who procure testimony to be taken in this way ought to be held bound to procure its correctness to be authenticated by the signature of the witness, or be precluded from using it, if objected to. This court, in *U. S. v. Pings*, 4 FED. REP. 714, suppressed depositions reduced to writing by the counsel of one party in the absence of the other, on account of the abuses to which such a practice, if sanctioned, would be likely to lead. The allowance of depositions like the present are still more objectionable, and could not be sustained, even if there were no general order applicable to the subject. That there was considerable delay by the stenographer in furnishing to counsel the transcript of his notes is no excuse; nor does the affidavit of the attorney show sufficient endeavors to find the witness, even if entire inability to procure him would have furnished a sufficient reason for admitting the testimony, which I do not think it would.

The deposition should, therefore, be suppressed.

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HOLMES and another v. PLAINVILLE MANUF'G Co.

SAME v. DUNHAM HOSIERY Co.

(Circuit Court, D. Connecticut. December 16, 1881.)

2. LETTERS PATENT—TAKE-UPS—REISSUES—NEW MATTER—INFRINGEMENT.

Reissued letters patent granted to George H. Holmes, June 25, 1878, for an improvement in take-ups for looms, are not invalid because broader than the original. They are not infringed, however, by the machine used by the defendant, as motion is not transmitted in the two machines by the same or equivalent means.

In Equity.

*Charles E. Mitchell*, for plaintiffs.

*Esek Cowen*, for defendants.

SHIPMAN, D. J. These two cases are each founded upon reissued letters patent to George H. Holmes, dated June 25, 1878, for an improvement in "take-ups" for looms. The original patent was granted August 10, 1869. The plaintiffs are the owners of the patents. The defences are the invalidity of the reissue, because it contains "new matter" and non-infringement, if the patent is construed by the court to be restricted to the invention as originally claimed. The original patent was for an improved "take-up" in looms for

weaving cloth. A "take-up" is a device for taking up or rolling the completed fabric upon an intermittingly-moving roller or cloth-beam. The improvement consisted in the arrangement of mechanism for regulating the tension of the cloth. The patented mechanism is described as follows: A ratchet-wheel is so connected with the cloth-beam that a movement of the wheel necessitates a revolution of the beam. This revolution imparts tension to the fabric. Mounted on the axis of this wheel there is an oscillating pawl-carrier, upon which is pivoted a pawl which engages with the teeth of the ratchet-wheel. Motion is imparted to the pawl and its carrier by means of a rod, one end of which is secured to the pawl-carrier. The other end rests loosely in a sliding collar. Motion is imparted to the collar by the crank which turns the "lay," or "the wooden frame beam which forces up the weft." The intermediate mechanism between the crank and the collar is the leg of the lay and a pitman.

"Upon the rod and surrounding it there is a spiral spring, one end of which bears against the reciprocating sliding collar, and the other end of which bears against an adjustable collar on the rod, which collar is termed a stop-nut in the patent. This collar or stop-nut can be adjusted longitudinally on the rod, so as to compress the spring more or less, and increase or diminish its tension as may be desired."

The operation of the mechanism is thus described in the specification of the reissue:

"It is obvious that when a reciprocating motion is given to the sliding collar, *m*, the degree of compression of the spring, and the consequent extent of motion of the pawl and the ratchet-wheel, will depend upon the resistance or tension of the fabric. Thus, if the cloth is slack, the spring will be but slightly, if at all, affected by the movement of the sliding collar, *m*, the strength of the spring being sufficient to move the pawl, and revolve the ratchet-wheel and take up the fabric, in which case the collar, *m*, will move with the rod, *L*, and not slide on it; but when there is sufficient tension on the cloth to overcome the power of the spring, the collar will slide on the rod and expend its blow or pressure in compressing the spring, and will not throw the pawl or move the ratchet."

In the language of the plaintiff's expert—

"The collar reciprocates positively over a given distance, while the movement of the rod, the pawl-carrier, the ratchet-wheel, and the cloth-beam will vary from time to time, according to the tension of the fabric and the resistance which is offered thereby to the motion of the beam which takes up the fabric."

The original claim was in these words:

"The slotted lever, J, pawl, *k*, ratchet-wheel, I, gear-wheel, G, the rod, L, spring, O, nut, *p*, and arm, *m*, the 'lay,' B, and cloth-beam, F, of the loom, when arranged with reference to each other, substantially as herein shown and described, for the purpose specified."

On May 16, 1876, letters patent were granted to Ira Tompkins and Albert Tompkins for improved take-up rollers for knitting-machines, and thereafter the plaintiffs' reissue was granted. The reissue was designed to extend the patent to machines for knitting as well as for weaving. The claims are as follows:

"(1) In a take-up device for looms, the combination of the ratchet-wheel, I, through which motion is imparted to the beam which takes up the fabric, the oscillating pawl-carrier, J, provided with pawl, *k*, the rod, L, spring, O, stop-nut, *p*, and reciprocating sliding collar, *m*, and operating mechanism, whereby the positive reciprocating motion imparted to the sliding collar is made to turn the ratchet-wheel a greater or less distance, according to the tension of the fabric, substantially as described. (2) In a take-up device for looms, the combination of the stop-nut, *p*, the rod, L, spring, O, sliding collar, *m*, the crank, M, and suitable intermediate mechanism, substantially as described, whereby the rotary motion of the crank is transferred into the compensatory reciprocating motion of the rod, L, for the purpose set forth."

A knitting-machine has nothing in common with a loom, for weaving, except that each has a roller upon which the completed fabric is rolled, and a take-up. The office of the take-up, in each machine, is to regulate the tension of the cloth. In a loom, it is necessary that the warp should be kept taut between the yard-beam and the cloth-beam. A knitting-machine produces a fabric made by a succession of loops, and as the necessities of the manufacture do not require that the yarn or threads should be kept tightly drawn, a smaller expenditure of force is necessary than in a loom take-up. The defendants' machines are rotary. The take-up rollers, and the frame which holds the take-up, revolve with the machine. Power is communicated to the crank gearing, which actuates the take-up mechanism, by the revolution of the frame upon its spindle. The take-up mechanism proper, of the Holmes and the Tompkins devices, are the same; the differences are in the mechanism by which power is communicated. The crank of the Tompkins device "directly actuates the take-up machinery, instead of actuating the lay of the loom to move the take-up mechanism."

The plaintiffs' case is founded upon the position that the Holmes invention was not a take-up for weaving looms only, but was a take-up device for any looms which require a take-up, and that the orig-

inal patent, by the introduction of the "lay" of a loom as one element of the combination, unduly limited the invention. The plaintiffs also insist that while the word "loom," as defined in the dictionaries, or when used technically, does not include a knitting-machine; yet, as used in the shops and in the patent-office, it does include such machine; but that this is immaterial, for whoever uses the loom take-up and employs the same combination in a knitting-machine to take up the fabric is an infringer, and that the crank-rod of the defendant's device, by which power is communicated to the pawl-lever, is the obvious mechanical equivalent of the lay and pitman of the Holmes device.

In my opinion the case turns upon the question, what was the invention which was described, either clearly or faintly, in the original patent? It is true that the actual invention of Holmes could have been applied to knitting-machines, and if the patentee had known the extent of his invention he could properly have made a broader claim, which would have been valid; but the point is whether it does not appear from the patent that the only invention which was the subject of the application was one applicable only to the weaving of cloth, and therefore whether a broad reissue is not faulty in that it contains an invention which was neither suggested nor applied for in the original application, but which is such an addition to the invention, as originally claimed, as to be properly the subject of a new patent.

Starting with the fact that whatever may be either the commercial or technical meaning of the word "loom," the meaning of "loom for weaving cloth" is very obvious, and with the additional fact that a knitting-machine is a structure of altogether different character from a weaving-loom, except that each machine produces cloth and needs a take-up, did the original patent indicate, suggest, or hint that the invention was anything but an adjunct to looms for weaving? The original application was strictly confined to such machines, and for a manifest reason. In cloth-weaving, whenever a thread of filling is passed between the threads of warp the lay is thrown forward and beats the thread of filling against the edge of the newly-woven cloth. The old take-ups made use of the constantly-recurring forward motion of the lay to turn the cloth-beam and to keep the yarn taut, for in a loom take-up the movement of the lay is the natural source of motion for the take-up mechanism. The inventor wanted to improve the existing device so that a better device or an improved

result could be had by the use of the same motive power. He was directing the attention solely to take-ups in looms, and not to take-ups in other and different pieces of mechanism, and his patent expressed plainly the subject of his thought and the result of his labor. That the invention could be applied to other machines was a discovery made after the date of the patent.

The original patent was open to objection, because it might be claimed that the patentee had included in the combination the "lay" as a lay, and not as a means of transmitting power, and therefore if the crank should be applied to any other lever than the woof-beater there would not be an infringement. This mistake was apparent on the face of the specifications, and justifies a reissue; but that the invention was improperly restricted, by limiting it to looms for weaving, was not thus apparent. Neither the specification taken alone, nor as construed by the state of the art in regard to the subject of the original patent, revealed that the invention was broader than the patent. That came to light after the state of the art on both looms and knitting-machines had been shown. I am of opinion that the loom of the reissue is the loom for weaving cloth of the original patent.

The inventors of the device which is used by the defendants apparently adapted the Holmes take-up to the needs of a knitting-machine, but not without alteration. They did not simply apply the old method to the new use without change. The new machine has no lay, and does not require the intervention of a lever between the crank and the pawl-carrier. A loom take-up must work with power to keep the fabric taut. A knitting-machine desires that the fabric shall not be strained by over tension, and therefore demands only the exercise of gentle force in the take-up mechanism. All that is required is that motion should be communicated from the crank directly to the pawl-carrier. In view of the different character and needs of the two machines, motion is not transmitted in these two devices by the same or equivalent means.

The bill is dismissed.

## GOTTFRIED v. CRESCENT BREWING CO.

*(Circuit Court, D. Indiana. 1881.)*

## 1. LETTERS PATENT—PITCHING BARRELS—INVALIDITY FOR WANT OF NOVELTY.

Letters patent No. 42,580, issued to J. F. T. Holbeck and M. Gottfried, May 3, 1864, for a new and improved mode of pitching barrels, are void for want of novelty.

## 2. OLD MECHANISM—ANALOGOUS USE.

There is no patentable invention in using the same mechanism for the purpose of applying a blast of hot air to the interior of beer casks to heat them, as had been previously used to apply a blast of hot air, of the same character, to the interior of moulds and other receptacles for the same purpose.

In Equity.

*Banning & Banning*, for plaintiff.

*Parkinson & Parkinson*, for defendant.

GRESHAM, D. J. Letters patent No. 42,580 were issued to J. F. T. Holbeck and M. Gottfried, May 3, 1864, for a new and improved mode of pitching barrels. This suit was brought by the plaintiff, as assignee and owner of the patent, against the defendant for infringement, and for an injunction and account. The invention consists in preparing casks for receiving pitch or other melted substance, which will render them impervious, by introducing into the casks a blast of highly-heated air. The mechanism described in the patent consists of a furnace with a vertical central opening and grate-bars near the bottom, over an ash-pit. A rotary fan forces the air through a pipe into the ash-pit and up through the fire on the grates, the heated air and products of combustion being thence driven into the cask through a pipe leading from the top or near the top of the furnace or fire-chamber. When the cask is sufficiently heated, it is removed and rolled until the interior surface is thoroughly coated with the melted pitch.

The defendant's device need not be described, as it is not denied that it is substantially the same in construction and mode of operation as the complainant's. The defence is that the patentees were not the original and first inventors of the alleged improvement; that the same had been described in certain English letters patent and foreign printed publications, and had been in public use in this country prior to the supposed invention or discovery.

It was held by Judge Blodgett in *Gottfried v. Fortune*, 13 O. G. 1128, that the plaintiff's invention was not anticipated by the Davi-



son & Symington patent for a method of cleansing, purifying, and sweetening casks, vats, and other vessels. And in a number of later cases, decided by Judge Dyer, and reported in 17 O. G. 675, it was held that the plaintiff's invention was anticipated by neither the Davison & Symington patent; the Cochran & Galloway patent for a machine for removing the inconvenience of smoke or gases generated in furnaces or fire-places by the combustion of coal or other inflammable substances, and, in certain cases, for directing the heat and applying such smoke or gases to various useful purposes; the Boville patent, which consisted in part of an improved mode of heating a blast by blowing the same partly through and partly over the fire in a retort or fire-proof chamber, and thence through suitable pipes into a smelting furnace; the Neilson patent for an improved application of air to produce heat in fires in forges and furnaces; nor the Devaux patent for certain improvements in smelting iron, stone, or iron ore by forcing a blast of pure air through a fire in an enclosed apparatus, and thence driving forward the products of combustion through a pipe into a smelting furnace containing the ore. In these cases Judge Dyer also held that the Beck machine, for heating the interior of beer casks and barrels, preparatory to pitching them, was simply an imperfect and abandoned experiment, and could not, therefore, prevail against the plaintiff's invention.

Thus far the record in this case presents questions which were ruled on by the learned judges in Illinois and Wisconsin.

The Seibel machine is constructed of strong sheet iron, about eighteen inches high, five or six inches wide, and three feet long. It rests upon four small feet an inch long. A long iron handle is attached to the top of one end, and a perforated pipe runs through and near the bottom of the machine. The machine containing ignited charcoal is inserted in the cask through the man-hole. The nozzle of a blacksmith's bellows is then inserted into the perforated pipe through an opening in one end of the machine, the bellows is manipulated, and the interior of the cask is heated with the products of combustion or gases until the hard pitch or other suitable substance, previously placed in the cask, is sufficiently melted for practical use. The evidence shows that this machine was constructed and used by Conrad Seibel, at St. Louis, as early as 1856, where it was generally used by brewers in pitching casks; that it was used elsewhere in the United States for the same purpose, and that it is yet so used. The defendant also relies upon an essay entitled the "Newest Discoveries," pub-

lished in Germany, in 1861, in a paper called "Der Bier Brauer," as anticipating the plaintiff's invention. This essay discusses the different methods of heating barrels and casks, and rendering them impervious. After giving his views at some length on the subject of drying casks or vessels by warm or heated air, the writer concludes as follows:

"In case of superfluous water or steam-power, a fan being at command, can be attached and thus blow the air through the vessels. Hereby the fan draws the air out of a channel which connects with the somewhat roomy ash place of a small pit or shaft furnace, which is fed with coke or charcoal whenever warm air is desired. The ash place has an opening from the side provided with a small door to mix the burning air, in case it gets too hot, with cold air."

The defendant introduced a model in connection with this publication which represents a grate in a furnace over an ash-pit. An exhaust passage connects a rotary fan with the ash-pit, and a discharge pipe from the fan is provided with one or more nozzles, which introduce the heated air and gaseous products into as many casks. In the side of the ash-pit is a cold-air inlet, which may be wholly or partially closed by a small door. The fan is adjusted between the furnace and the casks, and thus draws the air by suction from the outside through the fire and the exhaust chamber and forces it forward into the casks. I think from the evidence a skilful mechanic, familiar with the art, and this publication before him, could readily have constructed this model. In this mechanism the fan is between the furnace and the casks, and draws the air through the fire by suction, and then drives the heated blasts or products of combustion forward into the casks, while the plaintiff's mechanism has the furnace between the fan and the casks, and forces the cold air into the fire and the heated blast into the casks; the difference being in mechanical arrangement only, and not in principle or effect.

The Cochrane & Slate patent is also relied upon here, for the first time, as anticipating the plaintiff's invention. This English patent was issued on the third day of January, 1850, and provides for the application of a hot deoxygenated blast for heating and drying moulds for castings, instead of casks. The device consists of an external cylinder of sheet metal, having an interior cylinder fixed within it, the lower part of which is perforated. A fire-place made of fire bricks and supplied with small coke is constructed in a chamber or furnace resting on or over the cylinder when in use. The furnace contains

outlets for the escape of the products of combustion. A mould in a mould-box is inserted within the inner cylinder, and the drying apparatus is placed in position over the cylinders. The blast is then forced from the outside through a pipe into the fire-chamber through or partly through the fire, and the heated blast and gases are thence driven down through and around the mould, which is quickly dried. The hot blast or products of combustion which are here used to disperse moisture and dry moulds, is utilized by the plaintiff in heating the interior surface of beer casks. The subsequent application of pitch or other resinous substances is no part of the plaintiff's invention.

It is not claimed that Holbeck & Gottfried were the first to prepare the interior of barrels and casks for pitching by the application of heat, but it is insisted that their invention was novel in the character of their hot blast, it being deprived of oxygen, the use to which it was applied, and the manner in which the application was made. The first claim reads:

"The application of heated air under blast to the interior of casks by means substantially as described, and for the purposes set forth."

If the patentees deemed it important to use a hot blast from which the oxygen had been consumed, and it was their intention to cover such a blast, that intention was not clearly expressed in drafting the specifications and claims. If they deemed a non-combustible hot blast a part of their invention, why did they not cover it in plain terms in their patent? But construing their patent as providing for such a blast, the evidence shows that its properties had been long known, and that such a blast had been actually used in heating beer casks preparatory to pitching them. The plaintiff's arrangement of a rotary fan, an ash-pit, fire-grates, fire-chamber, and connecting and discharge pipes for forcing air from the outside into actual contact with the fire, and then driving the hot, decomposed blast into casks, was not novel. The German publication described a mechanism substantially like the plaintiff's in construction, mode of operation, and effect. There was no invention in the manner in which the patentees applied the decomposed blast to the interior surface of casks, nor am I able to see that they were entitled to a patent for the use which they made of the hot blast. The patentees took old and well-known mechanical contrivances for accomplishing useful results, and applied them to a new purpose. In this there was nothing to support a claim for a patentable invention or process. The various

instrumentalities which the patentees employed in their use of the hot blast operated just as they had previously operated when the same blast was used for other purposes. They employed old mechanism without producing a new effect. It may be true that this device produced a better result, but that, of itself, was not enough to sustain the patent.

In delivering the opinion of the court in *Roberts v. Ryer*, 91 U. S. 150, Chief Justice Waite says:

"It is no new invention to use an old machine for a new purpose. The inventor of a machine is entitled to the benefit of all the uses to which it can be put, no matter whether he had conceived the idea of the use or not."

And, says Justice Story, in *Bean v. Smallwood*, 2 Story, 408:

"The thing itself which is patented must be new, and not the mere application of it to a new purpose or object."

The plaintiff's patent was not for the application of an old machine to a new use. The interior of moulds and other receptacles had been previously heated by a hot blast, and the patentees used a blast of the same character to heat the interior of beer casks. No new application of a natural force or element in nature was pointed out or described in the patent.

This case is different in some essential respects from the cases which were decided by Judges Blodgett and Dyer.

The bill is dismissed for want of equity.

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#### DOWNTON v. ALLIS.

(Circuit Court, E. D. Wisconsin. October Term, 1881.)

##### 1. LETTERS PATENT—MIDDLINGS FLOUR.

Under certain contracts to which Robert L. Downton and Edward P. Allis & Co. were parties, the latter acquired no rights of ownership in an invention covered by patent No. 162,157, for a process in crushing grain or middlings.

In Equity.

W. G. Rainey, for complainant.

D. S. Wegg and Jenkins, Elliott & Winkler, for defendant.

DYER, D. J., (orally.) This is a bill filed by the complainant, Downton, against the defendant, Allis, the prayer of which, in brief; is that certain contracts, which are set forth *in extenso* in the bill, and to which reference will be presently made, may be decreed to be cancelled, and to be no longer in force; and particularly that it may be

adjudged that the defendant acquired, under said contracts, no rights of ownership in a certain invention covered by patent No. 162,157, for a process in crushing grain or middlings.

The bill was answered in detail, and the defendant therein also filed a cross-bill against Downton in which he asked affirmative relief upon the grounds substantially set forth in his answer to the original bill. To the cross-bill there was an answer.

A suit was also brought in this court by Allis against Stephen H. Seamans and Catherine Stephens, in which Allis alleged that he was the owner of this process patent, and that the invention covered thereby was being wrongfully used by Seamans; and the object of that action is to enjoin the defendants therein from the alleged infringement of the patent. To this bill a plea was filed, in which it was alleged that Downton had never conveyed or transferred to Allis his right and title in and to the patent, and that the right to use, and to license to others to be used, the patented invention, still remained in Downton. As these several causes involve the same controversy—which is the ownership of the process patent—by arrangement between counsel they have been heard together, and upon the proofs applicable to the several causes they are now to be simultaneously decided.

It appears from the evidence that in January, 1876, Downton and Allis, as the result of preliminary negotiations which had been for some time pending between them, entered into certain written contracts, one of which may be designated as the middlings-duster contract, the other as the process-patent contract, and the other as the personal-service contract. By the first of these instruments, in the order in which they have been enumerated, it was provided as follows:

"For and in consideration of the sum of \$125, to me in hand paid, I do hereby sell, assign, and set over to Edward P. Allis & Co., of Milwaukee, Wisconsin, their successors, and assigns, the exclusive right to manufacture and sell a certain machine, for which I agree to obtain a patent, to be known as 'Downton's peerless middlings duster,' for the full term of the patent, or any improvement or extension thereon. And upon the obtaining of said patent I hereby agree to execute such assignment.

*"Dated at Milwaukee, Wisconsin, this twenty-fourth day of January, A. D. 1876.*

[Signed]

"ROBERT L. DOWNTON."

The instrument relating to the process patent is as follows:

"For and in consideration of the sum \$125, to me in hand paid, I hereby sell, assign, and set over to Edward P. Allis & Co., of Milwaukee, Wisconsin, their successors and assigns, the exclusive right to manufacture and sell rolls for crushing grain or middlings, or other substances, which right or process is secured to me under patent numbered 162,157, dated April 20, 1875, for the full life of such patent and reissues, extensions or improvements thereon, except that the shop right to manufacture and sell in the state of Minnesota, but not elsewhere, is granted to O. A. Pray, of Minneapolis; said Allis & Co. having an equal right to sell in said state.

*"Dated at Milwaukee, Wisconsin, this twenty-fourth day of January, A. D. 1876.*

[Signed]

"ROBERT L. DOWNTON."

In the third agreement, known as the personal-service contract, it was recited that by certain agreements (referring to the contracts last mentioned) the right to the exclusive manufacture of Downton's peerless middlings duster and rolls, for crushing grain, had been conveyed by Downton to Allis & Co., and it was agreed that Downton should enter into their employment and engage in the sale of these machines and other manufactures of Allis & Co.; that he should be paid for his services at the rate of \$1,500 per year, and that upon all sales Allis & Co. were to receive certain profits, which it is not necessary to speak of more particularly. It was also provided by this contract that the engagement of Downton to Allis & Co., at the rate of \$1,500 per year, might be ended upon notice of six months by either party, or without notice upon the payment of \$750 in money. This contract is dated January 3, 1876. At the time of the execution of these several contracts, or soon thereafter,—and it is a close question of fact at what precise date the transaction between the parties occurred—an *addendum* was put to the personal-service contract, which provided that "in case of the termination of the above arrangement, by death or other casualty, the right to sell the machines referred to in the above agreement shall revert to the heirs or successors of R. L. Downton, the manufacture continuing in said Allis & Co., to whom all orders are to be sent." This *addendum* was signed by both of the parties.

As I have indicated, the question here involved is whether, under these contracts, or either of them, the defendant Allis acquired the title to the patent in question, which, if valid, is alleged to be of very great value. It is worthy of remark that these causes have been very thoroughly presented on both sides, and every point that can possibly support the conflicting theories of counsel has been forcibly

urged upon the attention of the court; and the court has endeavored to give to the cases the consideration which their importance requires.

Among other things, it is claimed in behalf of the complainant that he was led to enter into the arrangements evidenced by the contracts referred to, by false and fraudulent representations on the part of Allis, with reference particularly to the latter's capacity to manufacture the rolls mentioned in the process-patent contract; and with reference also to his pecuniary ability to engage in and carry forward such manufacture. Without adverting to the testimony bearing upon this question, in detail, it is enough to say that it does not support this claim.

It has been contended also by counsel for the complainant that in the case of *Downton v. Yaeger Milling Co.* 9 FED. REP. 402, decided by Judge Dillon, this process-patent contract was construed; and that the relations of Allis to that litigation were such that the construction there put upon the contract should be held *res adjudicata* here. I differ from counsel upon that point; that is to say, I do not think that the relations of Allis to that controversy were such as to make the decision in that case binding upon him. At the same time, I concur in the construction which Judge Dillon put upon this contract in the case cited. In other words, I am of the opinion that under a fair and proper construction of that instrument the right and title to the process-patent did not pass to Allis.

In considering this question, we have to bear in mind that there is a plain distinction to be taken between the process which was patented and the mechanism to be necessarily made and operated in the use of the process. The thing that was patented to Downton was not the right to make rolls for crushing grain or middlings; it was not the right to make a particular form of mechanism by which this thing could be done; because, so far as the record here shows, anybody would have the right to make rolls or to make the mechanical implements by which the process might be used. It was the process itself that was patented, and that invention, I think, was not transferred to Allis & Co. by the contract in question, nor by all the contracts which have been referred to, when combined or considered together. By referring to the patent we find that what the patentee claims as new, is "the herein described process of manufacturing middlings flour by passing the middlings, after their discharge from

the purifier, through or between rolls, and subsequently bolting and grinding the same for the purposes set forth."

Now, it will be observed that the language of the process-patent contract, before quoted, is this: "For and in consideration of the sum of \$125, to me in hand paid, I hereby sell, assign, and set over to Edward P. Allis & Co., of Milwaukee, Wisconsin, the exclusive right to manufacture and sell rolls for crushing grain or middlings or other substances."

In *Downton v. Yaeger Milling Co. supra*, the defendant set up this contract as an assignment to Allis & Co. of all of Downton's rights; and upon that question Judge Dillon, in his opinion, says that in order to enable the milling company to avail themselves of this contract as such an assignment—

"It must appear on its face to be a complete assignment of Downton's rights; if not, he can maintain this suit if not otherwise equitably estopped. Now, did he by this instrument assign his rights under the process patent? He says: 'I grant to them the exclusive right to manufacture and sell rolls for crushing grain or middlings or other substances, \* \* \* which right or process to manufacture and sell rolls is secured to me by said patent.' This seems to be based on a mistake from the beginning to the end. It is said, however, by the defendants, that he meant to convey something, and you must put a construction on it so as not to defeat the operation of the instrument; but my judgment is, since this does not operate intrinsically or *ex proprio vigore* as an assignment by Downton of his rights under that patent, they remain in him, and will remain in him as against Allis & Co., until Allis & Co. shall secure by the decree of a court in equity, if thereto entitled, a specific execution of an assignment of the process to them."

This is unquestionably a correct construction of the contract. If, then, it be determined that this instrument on its face does not convey the title to this patent to Allis & Co., the question properly arises in this suit, wherein Allis & Co. are seeking in effect the decree for a specific execution of an assignment of the patent to them, did the parties to this contract intend to convey the absolute ownership of the patent to Allis & Co.? And clearly the burden of showing that such was the intent of both the parties to the contract is cast upon the defendant Allis.

Upon consideration of the testimony I am not prepared to say that it was not at the time thought by Allis that he was acquiring an interest in the patent; but I think it is quite clear, in the light of all the testimony, and all the circumstances under which these various contracts were executed, that it was not so understood by Downton,



and of course if the contract does not in terms carry the patent, or convey all of Downton's rights under the patent, then it must be made to appear, in order to sustain the claim of Allis, that it was nevertheless the intent of both the parties that the title should be conveyed by that contract.

It is true that this agreement giving the right to manufacture and sell rolls for crushing grain or middlings excepts from its operation the shop right to manufacture and sell in the state of Minnesota, which was granted to O. A. Pray, of Minneapolis. And it must be admitted that this exception, thus expressed, is a circumstance which sustains the construction put upon this contract by counsel for Allis, namely, that it was the intention of both the parties that Downton's entire right under the patent should pass, since the evidence shows that a right to sell the process in the state of Minnesota was transferred by Downton to Pray, and was excepted in the contract with Allis & Co. But that fact or circumstance, I think, is not powerful enough to outweigh other circumstances in the case which lead my mind to the conclusion that Downton did not understand that he was transferring absolutely to Allis all his right and title to the patent at the time he made this contract; and those circumstances are not, I think, overcome by the proofs offered on the part of Allis.

It is in evidence that the parties to this contract, soon after they began their joint operations, prepared a circular, the authorship of part of which Allis admits. In another part of this circular, prepared by Downton, he declares substantially that he is the owner of the patent, and that all licenses to use the process must emanate from him. The court does not overlook the fact that Allis testifies that he did not at the time know that Downton had made such a statement in this circular. Nevertheless, it was a document that emanated from the offices of Allis & Co., and was put in circulation; and I think, under all the circumstances of the case, the circular must be regarded as having been jointly produced by the parties and published by them, so that both became equally affected thereby. Then there is a further fact in the case, that Leggett & Co., attorneys in Cleveland, Ohio, at one time made a demand upon Allis & Co. of payment for services rendered in preparing an opinion upon the validity of this patent; and in the communication which Allis & Co. made in response to this document they declined to make payment, upon the ground that they were not the owners of the patent. In this connection it should be said that Allis testifies that he was not personally informed that such a communication had been sent to

Leggett & Co. But it is, nevertheless, true that it was written in his office, and forwarded therefrom by one of his responsible subordinates; and afterwards, as it appears, the item of \$50, which Leggett & Co. had charged for their opinion upon the validity of the patent, was placed upon the debit side of an account prepared by Allis & Co., and was therein made a charge against Downton. Attempt has been made by reference to certain other entries which precede that, to show that the entry in question really meant a charge for advertising the opinion of Leggett & Co.; but I do not find any testimony in the case which shows that the opinion was ever advertised; and the amount of the item, as it appears in the account rendered to Downton, is precisely the same as the amount of the bill which Leggett & Co. rendered to Allis & Co.

The business relations between Allis & Co. and Downton appear to have continued to 1877, and it was not until that time that Allis asserted the right and title to the patent which he is now seeking to enforce in this litigation; and it may be generally remarked that from the time this contract of January 24, 1876, was made, until Downton left the service of Allis & Co., and until their business relations were terminated, this patent was treated as belonging to Downton, and it was not until difficulties arose between the parties, so far as the court is able to discover, that the claim now made by Allis was asserted. By these observations the court does not mean to say that during all this period that passed between the execution of the contract and 1877, Allis may not have thought that he had a claim upon the patent. But even if that be so, that is not sufficient, in view of the construction which the court is constrained to place upon this contract, to give to Allis the rights which he is now insisting upon. It must satisfactorily appear that both the parties understood and intended that all the rights under the process-patent, originally vested in Downton, should absolutely and forever pass to Allis.

It is to be observed also, that, as shown by the testimony, at one time, Allis said to complainant's solicitor that he understood his rights under this contract to be those of a mere licensee, and he did not then claim that he was the actual owner of the patent.

It is true, there is the testimony of one witness to the effect that Downton said he had parted with the patent. And another witness has testified to a remark which he says Downton made, and which, if made, was to some extent an admission by Downton that he had transferred the patent to Allis. But, considering the case comprehensively and in all its bearings, and in the light of all the circum-

stances which have been developed, my judgment is that it is not shown by the weight of the evidence that Downton intended to convey, absolutely, his right and title in and to this patent; and that he did not understand that he was making such an instrument of absolute conveyance. I must, therefore, hold that the title still remains in the plaintiff, Downton.

I have not undertaken to construe what has been spoken of as the *addendum* to the personal-service contract. Much was said in argument concerning its meaning and proper construction. In the view now taken of the case that part of the discussion becomes quite immaterial, and in disposing of the questions which it is here necessary to decide, I have only taken that *addendum* into consideration as a transaction between the parties which tends to strengthen Downton's claim that he did not intend to make an absolute conveyance of this patent to Allis & Co.

The complainant will have a decree as prayed in the original bill. The cross-bill will be dismissed, and the plea to the bill in the case of Allis against Seamans and others will be sustained.

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### THE JOSEPHINE SPANGLER.

(*District Court, S. D. Mississippi. January, 1881.*)

#### 1. MARITIME LIENS—MORTGAGES—PRIORITY.

Maritime liens have priority over mortgages.

#### 2. LIENS UNDER STATE LAWS—SAME—SAME.

As between a lien by force of a state statute for materials and supplies furnished a vessel in the home port, and a mortgage lien, the lien that attaches first has priority.

#### 3. LIENS.

One who advances money to the officers of a boat, with which to purchase a commodity to be shipped by the boat to him, has no lien on it for the amount of money so advanced, although the officers fail to make the purchase or refund the money.

#### 4. SAME—LEASE OF THE BAR OF A VESSEL—SALE OF THE VESSEL WITHIN THE TERM.

Where rent is paid in advance for the lease of the bar of a vessel and its privileges, and the vessel is sold before the term expires, the lessee has no lien on the vessel for a sum of money equal to the rent paid for the unexpired part of the term.

In Admiralty.

*A. N. Lea*, for the mortgage creditors.

*Pittman & Smith*, for the lienholders.

HILL, D. J. The vessel having been sold, the questions presented in this cause arise upon the claims and priority of the different libellants and intervenors. Most of the claims being strictly maritime liens, and the costs having been adjusted and paid, need not be further considered. The claim of Quackenmeyer is for money advanced to the owners with which to enable them to pay in part the purchase money for the vessel, under an agreement that for the sum of \$500 so advanced said Quackenmeyer was to have the use of the bar on the boat in which to sell liquors and other commodities usually kept and sold in such bars, and was, further, to have his passage and board on the vessel for 12 months thereafter. Four months after this contract was entered into the vessel was seized under process in this case. It is claimed that for the unexpired term, being eight months, the intervenor is entitled to have paid him out of the funds in the registry of the court, arising from the proceeds of the sale of the vessel, the sum of \$333.33 $\frac{1}{3}$ , being two-thirds of the whole sum so paid, and that said sum is a lien upon said fund. This contract was a lease of the bar and its privileges for one year, paid in advance, and nothing more; it was not necessary for the running of the boat or the accommodation of its passengers.

The claimant became the owner for the time of that amount of space on the vessel in which to carry on his avocation, out of which he expected to make money. His passage on the vessel, and his board upon it, were incidents to the contract. He cannot be considered as a passenger on the vessel, and entitled to any superior rights than the owners or master; indeed, he was for the time a limited owner of the space occupied by him. The money advanced by him was applied to payment for the boat itself, and not for the purchase of supplies, or any other purpose necessary for the repairs or running of the vessel, so that he does not occupy the position of a material or supply man. If he has any remedy, it is upon the implied warranty of the owners that the privilege would continue for the time stipulated. If any such warranty can be inferred, certainly it created no lien upon the vessel or the proceeds, which stand in the place of the vessel, consequently this claim must be disallowed.

The claim of the Yazoo Oil Mills is for money advanced to the officers of the boat with which to purchase cotton seed, to be shipped to the oil mills. The seed was not purchased, or the money advanced refunded. Had the seed been purchased and placed on the boat, it would have become bound for the delivery, and liable for a failure to do so; but, until that was done, the officers of the boat who

received the money were the personal agents of the company, and their failure to perform the agreement was only personal, and did not bind the boat. Therefore the claim must be disallowed.

The claim of Spangler under his mortgage for the balance of the purchase money is not disputed, nor are the claims for supplies and materials, claimed as liens under the state law, disputed; the question between them is one of priority only, upon which the rulings made by the circuit and district courts of the United States do not all agree.

It was held by this court, in the case of *The Emma*, that the maritime liens have a priority over mortgages. I am satisfied that this is correct, and sustained by authority. But such liens must be strictly maritime. Materials and supplies furnished at the home port are only liens by force of the state statutes, and therefore do not stand on the same footing with maritime liens. So that their priority depends upon whether they attach before or after the mortgage lien commenced. This position is sustained by Judge Drummond, (*The Grace Greenwood*, 2 Biss. 131,) which was followed by Judge Blodgett in the case of *The Kate Hinchman*, 6 Biss. 367, and again by Judge Woods in the case of *The John T. Moore*, 3 Woods, 61. The mortgage in this case was duly recorded in the office of the collector of customs of the home port prior to the existence of any of the liens so claimed. *The Bradish Johnson*, Id. 582.

The result is that the balance due Spangler upon his two notes for \$750 each, with interest thereon, must first be paid out of the funds in the registry of the court, and the balance, if any, distributed *pro rata* among the claims for materials and supplies.

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#### THE DELAMBRE.\*

(Circuit Court, D. Louisiana. November 25, 1881.)

##### 1. SALVAGE—CONTRACTS.

Contracts as to the *quantum* of compensation for salvage services are binding, provided they are reasonable, and without fraud or mistake.

##### 2. SAME—SAME.

Such contracts, when made with the master of a salvage vessel, bind the vessel but not the crew, unless made with their consent.

In Admiralty. On appeal.

\*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

*Emmet D. Craig*, for libellants.

*R. de Gray*, for intervening appellants.

*W. S. Benedict*, for claimants.

PARDEE, C. J. The services rendered by the various tug-boats and vessels, and their officers and crews, in aid of the *Delambre*, were undoubtedly salvage services. So far as they were rendered under specific contracts, these contracts should be the guide in fixing the compensation for such salvage services, provided they are reasonable, and without fraud or mistake, and bearing in mind that contracts only bind parties and privies. A contract as to the *quantum* of salvage, made with the master of a salvage vessel, will bind the vessel but not the rest of the crew, if made without their sanction and concurrence. See *The Britain*, 1 W. Rob. 40; *The Sarah Jane*, 2 W. Rob. 110-115. And this rule is regarded in this court. The evidence in this case does not establish that the crew of the *Harry Wright*, the crew of the *Ariel*, or the tow-boat *Confidence* and her master and crew, were parties to any contracts, or sanctioned or concurred in any contracts, stipulating a quantum of compensation for salvage services rendered. The evidence is voluminous and conflicting, but this is the conclusion reached by Judge Billings, and I fully agree with him therein:

(1) The allowance made to the *Confidence* of \$2,000 seems to be proper, considering the services rendered, and the circumstances of the service. The allowance of five-eighths to the boat and three-eighths to the crew, seems also properly proportionated. The services of the boat and her crew were not equal. The boat steamed a considerable distance, and helped to place the *Ariel* to receive cargo, all of which was ordinary service for the crew.

(2) The owners of the *Harry Wright*, the tow-boats *Joseph Cooper, Jr.*, *C. C. Keyser*, *George W. Childs*, and *Greyhound*, all of which boats rendered and claimed salvage services in conjunction with each other, settled their claims for compensation with the claimants in this case for the sum of \$3,300. This settlement seems to fix a fair allowance, and, considered in the light of an arbitration, may be taken as fixing the compensation of those boats and their crews. But of these services so rendered in conjunction, it seems that the *Harry Wright's* services were more valuable than any or all of the others. It was the *Harry Wright* that, after the others ceased operations, took off from the disabled ship nearly 600 bags of coffee and safely delivered it on the wharf at Port Eads, carrying it up South-west Pass and down South Pass. Of the \$3,300 allowed all these boats, the *Harry Wright* should be regarded as entitled to at least \$2,000; and that amount should be taken as the basis in fixing the compensation, which we have seen the crew are entitled to, notwithstanding the contracts of her owners and agents. Of this \$2,000, three-eighths to the master and crew is a fair proportion, considering the extra services of the

boat in transporting cargo a long distance, where the services of the crew were ordinary services, within the scope of their duty.

(3) The allowance made to the Ariel of \$1,000 is considered satisfactory; but the seven men taken aboard at Port Eads are entitled to their *pro rata* share of the one-half thereof belonging to the crew. They are before the court, and should be allowed the same as landsmen regularly shipped aboard the Ariel.

I only deem it necessary to say further in this case that, from the contracts made by the master and agents of the Delambre on one side and the tow-boats and tow-boat lines and Capt. Adams on the other, as they appear in the evidence, it seems that the Delambre is fully protected; and the real contest in this case is not interesting to that ship or her owners, but is really a contest among rival salvors as to the proper distribution of salvage compensation amicably agreed on, and therefore it is not necessary that this court should join the proctor of the ship in properly characterizing the greed and schemes and morals of many of the parties who have figured in the matter of salvage in this case.

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### THE JOHN CUTTRELL.

(District Court, E. D. New York. December 12, 1881.)

#### 1. MARITIME LIENS—TOWAGE SERVICE—SALE UNDER A STATE LAW.

By the maritime law of the United States, one who performs towage services for a domestic vessel, on navigable waters of the United States, acquires a maritime lien on the vessel, which he can enforce by an admiralty proceeding *in rem*; and the lien cannot be destroyed by a subsequent sale of the vessel under a state law.

#### 2. LACHES.

On the facts of this case, a defence based on the ground of laches must fail.

In Admiralty.

*H. G. Hull*, for libellant.

*Tunis G. Bergen*, for claimant.

BENEDICT, D. J. This is a proceeding *in rem* to enforce a lien for services performed in towing the lighter John Cuttrel. The nature and amount of the services are admitted. These services were necessary to enable the lighter to make voyages and earn freight. It was by means of them that she was enabled to navigate. It cannot, therefore, be doubted that the services in question, rendered as they were in the performance of a maritime contract, are maritime in character. The demand is, then, within the jurisdiction of the admiralty. It is equally clear that these services, by reason of their

character, gave rise to a maritime lien upon the lighter. The existence of such a lien is not affected by the fact that the lighter was a domestic vessel. The supreme court of the United States adhere to the anomalous doctrine that when the vessel is domestic a materialman has no lien by the maritime law of the United States; but that doctrine has never been extended to such a case as this, where the claim is for services performed in navigating a vessel on navigable waters of the United States, in the harbor of New York, and in part between New York and Weehauken, in the state of New Jersey, and I am by no means inclined so to extend it.

The right of the libellant to maintain this proceeding I therefore consider to be clear, and I proceed to consider the matters of defence. One defence is that the claim is stale and the lien lost by laches. The service rendered to this vessel, as disclosed by the libel, was in substance a continuous service, extending through the months of August, September, October, and November, 1879. In January, 1880, the vessel was taken possession of by the sheriff, by virtue of a writ from the state court, and retained in his custody until March 12, 1880, when she was sold to the present claimant at sheriff's sale. The libel in this proceeding was filed March 1, 1880, and notice thereof was given at the sheriff's sale. Upon these facts it is impossible to contend that there has been any unreasonable delay in enforcing this demand, and the defence based on the ground of laches must fail.

Lastly, it is contended that the libellant's lien was cut off by the sheriff's sale of the vessel. That sale was had in a proceeding taken in accordance with the laws of the state of New York (Laws 1862, c. 482) to enforce a lien for repairs and material furnished, created by those laws, and whatever may be finally settled in respect to the validity of such a sale for any purpose, I am unable to see how it can ever be held that the legal effect of such a sale is to destroy a maritime lien upon the vessel existing at the time of the commencement of the proceedings under the state law, and which by the laws and constitution of the United States the parties have the right to enforce by an admiralty proceeding *in rem*. *The Lottawanna*, 21 Wall. 580.

My opinion, therefore, is that the libellant's lien was not affected by the sheriff's sale in the proceeding taken in the state court, and remains a valid and subsisting lien upon this vessel, capable of being enforced by this proceeding. Let a decree be entered condemning the vessel to pay the libellant's demand, with costs.



## NEW HAVEN STEAM SAW-MILL CO. v. SECURITY INS. CO.\*

*(Circuit Court, D. Connecticut. January 6, 1881)*

## 1. MARINE INSURANCE—POLICY CONSTRUED.

In a printed policy of insurance the assured warranted "not to use ports and places in Texas, except Galveston; nor foreign ports and places in the Gulf of Mexico." On the margin was written the following: "To be employed in the coasting trade on the United States Atlantic coast;" and underneath, also in writing, the words "Permitted \* \* \* to use gulf ports not west of New Orleans." The vessel was lost in the Gulf of Mexico, west of New Orleans, while on a voyage from Maine to Morgan City, Louisiana, a place west of New Orleans. *Held*, that when the loss occurred the vessel was on a voyage not permitted by the policy. Libel dismissed.

In Admiralty.

*H. Stoddard, L. H. Bristol, and C. R. Ingersoll*, for libellant.

*J. W. Alling*, for respondent.

BLATCHFORD, C. J. This is a libel in admiralty, filed in the district court, to recover \$3,000, the sum insured by a valued marine policy of insurance issued by the respondent to the libellant, insuring the schooner Tannhauser for one year from January 28, 1880. The policy is a printed form, filled up with writing, and containing additional written clauses. It contains the following clauses wholly in print:

"Warranted by the assured not to use ports on the continent of Europe north of Hamburg; nor the Mediterranean east of the Ionian islands, during the period insured; nor ports on the continent of Europe north of Antwerp between first of November and first of March; nor ports in the British North American provinces, except between the fifteenth day of May and fifteenth day of August; also warranted not to use the West India islands during the months of August and September; also warranted not to use ports and places in Texas, except Galveston; nor foreign ports and places in the Gulf of Mexico; nor places on or over Ocracoke bar; nor any of the West India salt islands; nor ports or places on the west coast of America, north of Benicia; nor to use the Min river, nor Torres straits, during the period insured." "Also warranted not to load more than her registered tonnage with lead, marble, coal, slate, copper ore, salt, stone, bricks, grain, or iron, either or all, on any one passage."

On the margin of the face of the policy, written at a right angle to the printed lines, are these words: "*To be employed in the coasting trade on the United States Atlantic coast*," in one line. Underneath that line, and in one line parallel with it, are these written words:

\*See 7 FED. REP. 847, for the opinion delivered by the court below.

"Permitted to carry grain and heavy cargoes over tonnage on coastwise voyages, and to use gulf ports not west of New Orleans." The libel claims for a total loss of the vessel by the perils of the seas, while on a coastwise voyage within the policy. The answer denies that the voyage was within the policy, and avers that at the time of the loss the vessel was not on a voyage within the terms of the policy, but was by the voluntary act of the master and owners on a voyage to a port in the Gulf of Mexico west of New Orleans, to-wit, the port of Morgan City, state of Louisiana, and not upon any voyage protected by the terms of the policy, and at the time of her destruction was upon that part of her voyage to Morgan City which was west of the port of New Orleans, and so known to her master, and she stranded on the shore of the Gulf of Mexico, west of the port of New Orleans, because her master mistook, in taking his course to the port of Morgan City, the light on Timbalier island for the Ship Shoal light, both of which lights were west of the port of New Orleans. The proof in the case consists entirely of the following written stipulation, entitled in the suit, and signed by the proctors for the respective parties while the suit was pending in the district court, and of the documents referred to in the stipulation:

"We hereby mutually stipulate and agree that the following are the facts applicable to the issues presented by the pleadings in the above-entitled cause, and consent that this stipulation and the statement of facts forming part thereof shall be entered and filed as the finding of the court as to the facts in said cause: On the fourth of February, A. D. 1880, the Security Insurance Company, acting within the scope of its corporate capacity, executed and delivered to the New Haven Steam Saw-Mill Company the valued policy of insurance for \$3,000, upon said mill company's interest in the schooner Tannhauser, a copy of which policy is annexed to the libel in said cause, and marked exhibit A, and said policy is itself referred to and made part of this agreement and finding, a *verbatim* copy of which is appended and marked A. On the eleventh of June, 1880, the said schooner Tannhauser, while on a voyage from the port of Rockland, in the state of Maine, to Morgan City, known on the United States coast survey map of 1870 as Brashear, in the state of Louisiana, went ashore and was wrecked on a reef in the Gulf of Mexico, west of the port of New Orleans, and was totally destroyed by the perils of the seas. That the statement set forth in the proofs of loss filed with said insurance company, and being the marine protest of the master and crew of said vessel, are true so far as any issue in this cause is concerned, and said protest and the statement therein contained are hereby made part and parcel of this stipulation and finding, and annexed hereto, marked Exhibit B. It is hereby mutually agreed that maps or charts may be referred to for the purpose of defining and determining the location of the spot where said vessel was

lost, and of any place or locality referred to in said policy or proof of loss. That proper proofs of loss were filed with the insurance company in due season, and that the libellant is entitled to recover upon said policy the amount insured thereby, (less the note of \$301, given for the premium on said policy) with interest from the \_\_\_\_\_ day of \_\_\_\_\_, unless the law is so that upon the facts set forth in this finding said libellant is not entitled to recover, in which case judgment is to be entered for said respondent."

The protest states that the vessel left Rockland on May 17th, with a cargo of ice, bound for the port of Morgan City, Louisiana; that for two days before June 11th they had not been able to take an observation, on account of cloudy and hazy weather; that during the evening of the 11th they sighted a light which they took for Ship Shoal light, and kept on their course accordingly, but at 10:30 o'clock P. M. the vessel suddenly took the ground; that they immediately let go an anchor, but the vessel soon began to leak, and the ice to melt from contact with the gulf water, and in a short time she had filled and rolled over, so that pumping was useless; that the next day they discovered that the light they saw the evening before was not Ship Shoal light, but the light on Timbalier island, and that the vessel was ashore on a reef about two miles from Vine island, and about 15 miles from Timbalier island; and that the vessel is a total loss.

The district court dismissed the libel. It appears from the decision of that court that the libellant there contended that "the coasting trade on the United States Atlantic coast" meant trade from Maine to Texas; that the written permission to use ports in the Gulf of Mexico not west of New Orleans, meant, in view of the printed restriction against using foreign ports in that gulf, a permission to use foreign ports in that gulf not west of New Orleans; that if the vessel was prohibited from using any gulf ports west of New Orleans, she was not using any such port at the time of the disaster; and that an intent to use a prohibited port did not avoid the policy. The court held that the meaning of the two written clauses in the policy was that the vessel was to be employed on the United States Atlantic coast, which was the coast of the Atlantic ocean and not the coast of the Gulf of Mexico, but that if necessity or occasion required she was to be permitted to go into the Gulf of Mexico and use the ports not west of New Orleans; but not that her coasting trade was to be thereby extended through the gulf; and that when she was engaged in transporting a cargo from Maine to Morgan City she was not in

the Atlantic coasting trade, but upon a voyage outside of the terms of the contract. The view of the court was that if the coasting trade was to be through the gulf the permission to use ports in the gulf was unnecessary; and if the coasting trade upon the United States Atlantic coast necessarily implied voyages through the gulf, a permit to use any gulf ports not west of New Orleans was unnecessary, as those United States gulf ports had not been excluded in the printed part of the policy; that the fact that the vessel was to be a coaster on the United States Atlantic coast, coupled with a permit to use certain ports in the gulf, indicated that without the permit the vessel could not go into the gulf; and that the permit apparently enlarged the previous limitation, especially as domestic ports not west of New Orleans had not been excluded.

The case for the libellant is argued in this court upon grounds apparently not urged in the court below. There are in the printed clauses of the policy many warranties, above cited by the assured, not to use (1) certain ports and places; (2) certain waters. There are also printed warranties, above cited by it, against loading more than the registered tonnage of the vessel with heavy cargoes, including grain. The printed form is a blank from a purely time policy, under which the vessel would have a right to go anywhere, except as prohibited by the warranties not to use the ports, places, and waters specified as forbidden. Then, on the margin, are the two written lines which control. The first line relates to voyages. It purports to specify voyages. It is enabling and permissive. It declares that the vessel is "to be employed in the coasting trade on the United States Atlantic coast." It is an affirmative statement of voyages. It means that the vessel is to be employed in those voyages only. Both parties so declare. This, in connection with the time clause, one year, makes the policy a mixed policy, specifying both time and voyages. Then follows the second written line. It is a permission. It begins with the word "permitted." That word qualifies the entire line. Naturally, we should expect to find in such permission something permitted which was not permitted by the preceding printed and written clauses; whether something merely not before permitted, or something before actually prohibited. Accordingly, the first thing permitted is a permission "to carry grain and heavy cargoes over tonnage on coastwise voyages." This had before been prohibited in the clause above cited from the printed clauses. Then follows, in the same sentence, under the word "permitted," and after a comma, the

words "and to use gulf ports not west of New Orleans." The word "and" is a copulative. It makes of the second branch of the sentence a permission, and that branch is to be read as if the word "permitted" was inserted between "and" and "to." The use of gulf ports in the United States, not west of New Orleans, had not been prohibited by the printed clauses. But then came in the first written line, declaring affirmatively what the voyages should be. As the use of gulf ports in the United States, not west of New Orleans, was not forbidden by the printed clauses, the special permission in the second written line to use them was wholly useless, if the use of them was allowed by the words in the first written line, "the coasting trade on the United States Atlantic coast." These last words must be construed as not including voyages to gulf ports not west of New Orleans, in order to make the two sentences symmetrical.

For the purpose of supporting the view that "the coasting trade on the United States Atlantic coast" includes coasting trade in the gulf up to the line of Mexico, and that the vessel was on a voyage in such trade, the advocate for the libellant contends in this court that the words "and to use gulf ports not west of New Orleans" are to be read as if they were "and not to use gulf ports west of New Orleans," so as to make of it a warranty not to use ports west of New Orleans, and a warranty not broken because no such port was used, while the voyage was a lawful one because in a permitted coasting trade. This is ingenious but not sound. "Permitted not to use" is not a form of expression that any person of intelligence would use. There are two permissions in the sentence. One is to carry something; the other to use something. The right to carry the thing so permitted was prohibited but for the permission. The right to use the thing so permitted was not within the coasting trade allowed, but for the permission. Both of the written lines in regard to voyages refer to the subject-matter of the insurance. If the vessel, when lost, was not employed in the coasting trade on the United States Atlantic coast, and was not availing herself of the permission to use gulf ports not west of New Orleans, the risk was not covered by the policy.

The voyage clauses must be held to mean that the vessel was to be employed in the coasting trade on the United States Atlantic coast proper, excluding the gulf, but with the added permission that she might use ports in the gulf not west of New Orleans, and might enter the gulf for the purpose of proceeding to such ports with a view to use them. A voyage in the gulf west of New Orleans, with a view

to proceed to and to use a United States gulf port west of New Orleans, and a loss west of New Orleans, on such voyage, was not a risk within the permitted voyages of the policy. There was no way, under the policy, by which the vessel could enter the gulf, consistently with the first written line, except by the permission in the second written line, and that permission gave her no right to be west of New Orleans on a voyage to Morgan City. There is a clear intention manifested and expressed by the words of the policy of not insuring against the perils of a coasting trade on the gulf coast west of New Orleans, or against the perils of trying to enter a United States gulf port west of New Orleans.

The case of *Snow v. Columbian Ins. Co.* 48 N. Y. 624, was the case of a purely time policy, not prescribing any voyage or trade, and having warranties against using certain ports, places, and waters. One of them was a warranty not to use ports in the British North American Provinces except between certain days. The vessel, at a time not between those days, sailed for a port in a British North American province, and was lost on the coast of that province, about 50 miles from that port, at a time not between those days. It was held that the insurer was liable, as there had been no use of the forbidden port. The decision was put on the ground that the vessel had a right to be in the water where she was. In the present case, on a proper construction of the policy, the vessel was sailing in forbidden waters.

The case of *Palmer v. Warren Ins. Co.* 1 Story, 360, was the case of an exception or exclusion of what would otherwise have been included in the general terms of the policy. It differed from the present case. Moreover, the policy was purely a time policy, with no designation of prescribed or permitted voyages or trade.

The libel is dismissed, with the costs of the respondent in the district court, taxed at \$20, and costs of the respondent in this court.

DWIGHT and others v. CENTRAL VERMONT R. Co. and others.

(Circuit Court, D. Vermont. October Term, 1881.)

1. EQUITY PLEADING—PARTIES—DEMURRER.

A demurrer to a bill in equity for want of the necessary parties must name the proper parties.

2. SAME—NEGATIVE PLEA.

A negative plea must be supported by an answer to so much of the bill as is denied.

3. SAME—PARTIES—PLEA.

A plea to a bill brought by certain stockholders in a railroad corporation which set out that there were, when the bill was brought and the plea filed, certain other stockholders, who are not joined in the bill as parties, who are citizens of certain states, naming them, whose names are known to and ascertainable by the orators, and not by the defendants, *held* to be insufficient, and overruled.

4. SAME—LEGAL PROCEEDINGS IN A STATE COURT—PLEA

A bill in equity was brought by certain stockholders in the Vermont & Canada Railroad Company, among others against the Central Vermont Railroad Company, in possession, to recover the possession of that road for the Vermont & Canada Railroad Company. The Central Vermont Railroad Company pleaded that it was in possession as a receiver of a state court, and set forth the proceedings upon which its possession took place. *Held*, that such rights must stand for trial according to the usual course. Plea overruled.

5. JURISDICTION—STATE AND FEDERAL COURTS.

When the two suits are not brought upon the same facts, nor for the same relief, the pendency of a suit in a state court cannot be successfully pleaded to the further prosecution of a like suit between the same parties, or their representatives, in a federal court in the same district.

In Equity.

*Prout & Walker* and *E. J. Phelps*, for orators.

*Benjamin F. Fifield*, *Geo. F. Edmunds*, and *Daniel Roberts*, for defendants.

WHEELER, D. J. The orators, who are stockholders to a large amount in the Vermont & Canada Railroad Company, and citizens of New York, New Hampshire, and Rhode Island, bring this bill in behalf of themselves and all other stockholders having like interests with them, not citizens of Vermont, Massachusetts, or Maine, against the directors of that corporation, citizens of Massachusetts and Pennsylvania, alleging that they refuse to take legal measures to protect the rights of the orators, and against the Central Vermont Railroad Company, in possession, and the Vermont Central Railroad Company, lessee of, and the other defendants, security-holders, claim-

ing liens upon the Vermont & Canada Railroad, all citizens of Vermont, Massachusetts, and Maine, to recover the possession of that road for the Vermont & Canada Railroad Company.

The Central Vermont Railroad Company pleads that it is in possession as a receiver of the court of chancery of Franklin county, and of the state of Vermont, and the proceedings upon which its possession took place are set forth.

John Gregory Smith pleads that security-holders, of the same class as those made defendants, have brought proceedings in behalf of themselves, and all others like security-holders, against the Vermont & Canada Railroad Company, in the same court of chancery, to establish and enforce their security upon this road, in which a decision favorable to the validity of their lien has been made by the supreme court of the state, and which are now pending in the court of chancery to ascertain the amounts of, and facts concerning, the different classes of securities; and these proceedings are set forth.

Worthington C. Smith pleads that the Vermont & Canada Railroad Company brought a suit like this, and for the same relief, in the same court of chancery, and through its directors, by preconcert with the orators, discontinued the same that this suit might be brought to evade the proper jurisdiction of the state court, and confer a seeming, but unreal, jurisdiction upon this court, in pursuance of which this suit was brought; and denying that the directors have violated their duty, committed any breach of trust, or done otherwise than as requested by the orators.

Jed P. Clark pleads that the orators did not, before bringing this bill, in good faith request the directors to take legal measures to protect their rights, but that by the planning, suggestion, and request of the directors, and concert and arrangement made between them and the orators for the sake of escaping from the jurisdiction of the state court, to which the jurisdiction of right belonged, and to confer upon this court a seeming jurisdiction not real or of right, a simulated and unreal pretence of request and refusal were made, and that this suit is prosecuted by the Vermont & Canada Railroad Company, in the name of the orators, for the common benefit of them all, and denying that there has been any such refusal by the directors as amounts in legal effect to a breach of trust.

The Vermont Central Railroad Company sets out by plea that there were when this bill was brought, and are now, divers and sundry stockholders of the Vermont & Canada Railroad Company,



citizens of Vermont, Massachusetts, and Maine, whose names are known to and ascertainable by the orators, and not by the defendant, and demurs to the bill for want of the necessary parties.

None of these pleas is supported by answer. All of them, and the demurrer, have been argued. They may properly be considered in the inverse order of their statement.

The last one, that of the Vermont Central Railroad Company, is not in the proper form and sufficient, even if the fact that there were stockholders, citizens of Vermont, Massachusetts, or Maine, not invited to take part in the prosecution of the suit, would defeat it. In such cases the defendant should, at law, give the plaintiff a better writ, by setting out the name and identifying the party whose existence is alleged to create a fatal non-joinder, so that the plaintiff may traverse the allegation and form a definite issue to be tried, or discontinue and bring a new suit, joining the proper parties, upon the information given. The rules of pleading are the same in equity as at law, unless the reasons of them are varied by the different methods of procedure. There is no reason growing out of the proceedings in equity for varying this rule. The orators have the right to have the names of the stockholders, if there are any in those states whose existence would defeat the suit, set forth, so that they could traverse the existence of the persons or the fact of their being stockholders. They could not do that upon these allegations. There is no person named whom they may say is not a stockholder, or about whom they may say there is no such person. A traverse of the plea in its terms would put in issue what the orators know that the defendants do not know about the stockholders in those states. It would be quite singular if a suit should be abated at the instance of defendants on account of the supposed existence of persons whom they cannot name or identify. The want of such persons as parties is not likely to harm them. *Hotel Co. v. Wade*, 97 U. S. 13.

The pleas of Clark and Worthington C. Smith are to the same effect, and so nearly alike that they may well be considered together. They have been spoken of in argument as pleas to the jurisdiction of the court, or to the ability of the orators to bring suit, or as pleas in abatement otherwise; but, correctly speaking, they are not either. The orators and defendants are alleged in the bill to be citizens of different states. This fact gives the court jurisdiction of the controversy between them, and enables the orators to bring the suit, and to maintain it if they can establish their case. The refusal of the

directors is a part of their case which they must establish, and not a fact on which the jurisdiction of the court, or their ability to sue, at all depends. If they can establish the fact of refusal, together with the other facts necessary to make out a case for the relief asked, then they have a case on which they can rest; otherwise, not. They have the right to a full answer and discovery from the defendants as to their whole case, this part as well as the rest, unless there is some outside fact which would show that they have no right to maintain the suit at all; or some single fact on which the whole case depends is objected to by plea, and full answer and discovery are made to that part of the case. Pure and proper pleas in equity were such as set up some fact outside of the bill which would show that the bill should not be answered at all. These pleas required no answer to support them, for they would not be included in that which the party was called upon to answer. Anomalous pleas, denying a single part of the case, may, by the bill on which the whole case depended, come to be allowed, for convenience, to save trying the whole case, when the failure of that part would be fatal, and for safety against enforced discovery in a suit by those not in any manner entitled to the discovery; but, as the ground of the plea would be included in what the defendant was called upon to answer, he could not avoid the right to have at least that part answered by merely pleading to it. He must answer that, although the plea raising the objection and the answer supporting it might show that no answer to the rest of the case ought to be required. If this plea should be allowed, the orators would be deprived of the discovery on oath to which they are entitled, as to this part of the case, as evidence upon the traverse of the plea, if they should traverse it, as they would have a right to do. This would be contrary to sound principles and to authority. Story, Eq. Pl. § 372 *et seq.* These views are not contrary to the decision in *Memphis v. Dean*, 8 Wall. 64, cited and much relied upon in behalf of the defendants. There was an answer by the party pleading, as well as the plea, denying refusal of the directors to prosecute, and the cause appears to have been decided in both courts in chief, and not upon the plea alone.

The plea of John Gregory Smith depends solely upon the effect of the pendency of the suit in the state court of chancery in favor of himself and other security-holders, of which James R. Langdon is the foremost plaintiff in the title to the suit against the Vermont & Canada Railroad Company, through whose rights the orators here

make claim. Doubts have been entertained by this court and some others as to whether the pendency of a suit in a state or federal court in the same district might not be successfully pleaded to the further prosecution of a like suit in the other court, and this court inclined to the opinion that it could be. *Mercantile Trust Co. v. Lamoille Valley R. Co.* 16 Blatchf. 324; *Andrews v. Smith*, 5 FED. REP. 833. But it now seems to be well settled that it cannot be. *Gordon v. Gilfoil*, 99 U. S. 168; *Latham v. Chafee*, 7 FED. REP. 520. If this were not so it has always been held that, in order to have the mere pendency of one suit defeat another, the suits must be between the same parties, or their representatives, upon the same facts, and for the same relief. *Watson v. Jones*, 13 Wall. 679. A very slight examination and comparison of the two cases will show that they are not brought upon the same facts nor for the same relief. The plea is pleaded to the whole bill. According to both bills the Central Vermont Railroad Company is in possession of the road. In that case it is an orator as a security-holder seeking to hold the road as security for its pay. This particular defendant is a defendant there admitting the right of the Central Vermont Railroad Company. That is essentially a bill of foreclosure by security-holders in possession. The decree would ordinarily be that those interested must pay or be foreclosed of all right to redeem. The decree could go no further than to cut off their right if they should not redeem. If they should redeem, the possession would remain to be maintained by any other right which the possessor might have or claim to have, so far as it would prevail. Another suit would be necessary to determine the rights of the Vermont & Canada Railroad Company and its stockholders as to everything but the foreclosure. In this suit the right to the road is attempted to be maintained outside of the right to redeem. If this plea should prevail there would be no suit left in which that right could be tried.

The plea of the Central Vermont Railroad Company raises the most important questions of any of these pleas, and has received such careful consideration as its importance has seemed to demand. The bill alleges that this defendant is in possession of the road without right, and against the right of the Vermont & Canada Railroad Company and of the orators. This plea asserts that it was placed in possession by the court of chancery of Franklin county to run, operate, and manage the road under the decree and orders theretofore made, and under the direction of the court, so long as it should

continue to act as such receiver and manager, and denies that it is in possession without right, and that it ought to be compelled to surrender its possession to the Vermont & Canada Railroad Company, and prays judgment whether it ought to answer further. The proceedings upon which it was placed in possession show that certain persons were, in regular course, made receivers of this road, with other railroad property, to operate the roads, and out of the income to pay the rent to the Vermont & Canada Railroad Company; that pursuant to an agreement between the parties, according to its terms embodied in a decree, the then receivers continued to operate the roads according to the provisions of the agreement and decree, by which they were to operate them and apply the income to the payment of the rent; then to the payment of the first-mortgage bonds of the Vermont Central Railroad; then to the second-mortgage bonds of the Vermont Central Railroad; and then to pay it to the Vermont Central Railroad Company; and that upon the joint petition of those receivers and their successors, and the Central Vermont Railroad Company, a decree was made by which the Central Vermont Railroad Company was placed in possession in their stead.

The orators claim that the prior possessors had lost their right to this road through their non-payment of rent, and that the transfer to the Central Vermont Railroad Company was merely a transfer by one to the other, although sanctioned by the court, and that the transferee took no greater or different rights than the transferors had. The defendants claim that the transfer was ordered by the court; that the rights of the Central Vermont Railroad Company, under the transfer, cannot be inquired into anywhere except in that court; and that they are valid everywhere else against all claimants. The right of the orators, denied by the plea, is the same which they set up and seek to enforce by their bill, and which they claim to have tried and determined upon the answer of the defendants in the usual course. As stated before, the parties are citizens of different states, and this is a suit in which there is a controversy between them, and which those bringing it have the right to have determined in this court, unless there is some unusual reason for turning them out of court.

As said by Mr. Justice Campbell in *Hyde v. Stone*, 20 How. 170: "But the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." This is

not a mere matter of abatement; it goes to the right, and none the less because the right of the defendant may rest upon an order of the court. The order of court, whatever its effect is, may be discharged before any decision is reached, and, if it should be, the rights of the parties otherwise would still remain to be determined. If it should not be, but should remain in force, whatever right it should give to any party, or whatever immunity from interference it should afford, could be maintained and upheld. If that should be the defendant's title, and it should be found to be good, it would prevail. There would be no conflict between courts, for all rights acquired through the state court, and all protection furnished by the authority of that court, would be respected. There is no sound reason apparent why these rights may not stand for trial according to the usual course, the same as rights acquired by contract, or in any other mode. On principle this seems to be the proper course. : And there is not any case shown by counsel, or which has been seen by the court, among the many wherein rights acquired under legal proceedings have come up for adjudication, in which the decision has been made otherwise than in chief.

In *Hagan v. Lucas*, 10 Pet. 400, where the title of a sheriff to property seized by him and receipted was upheld against a marshal of the United States, who seized it subsequently, the trial was upon the merits of these respective rights. So in *Brown v. Clarke*, 4 How. 4, and in *Pulliam v. Osborne*, 17 How. 471. And in *Taylor v. Carryl*, 20 How. 583, where the question was as to the right of a state seizure, as against proceedings in admiralty, the trial was not upon any plea denying the right to interfere, but was upon the title acquired through the proceedings.

In *Freeman v. Howe*, 24 How. 450, the right of a mortgagee to personal property taken by the marshal, on process against the mortgagor, was tried on replevin in chief. So similar rights were tried in an action of trespass in *Buck v. Colbath*, 3 Wall. 334. And in *Wiswell v. Sampson*, 14 How. 52, the right acquired by the levy of a marshal upon property in possession of a receiver was tried upon ejectment on the merits.

In *Pond v. Vermont Valley R. Co.* 12 Blatchf. 292, the question of this same receivership was raised, but not until after the decision reported, and upon the hearing before Circuit Judge Johnson on answers and proofs, and it was disposed of as not affecting the rights of the parties to the property involved, nor the jurisdiction of the court over the case.

Attention has been particularly called to the provisions of section 5 of the act of March 3, 1875, to determine the jurisdiction of the circuit courts, etc.; 18 St. at Large, 470, (Supt. Rev. St. 175,) enacting:

"That if, in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just," etc.

Speaking of this section, *Johnson, J.*, in *Warner v. Pennsylvania R. Co.* 13 Blatchf. 231, said: "All that is necessary to bring the case really and substantially within the jurisdiction is, that it involves a controversy of the character, either as to the subject-matter or the parties, specified in either the section which defines the jurisdiction by original suit, or that which authorizes removal, and the acquisition of jurisdiction in that manner." As before stated and shown, the parties to this suit are citizens of different states, and the suit is one of which this court has jurisdiction for that reason, if the orators can make out the case presented by their bill, including the refusal of the directors to prosecute as a part of their case; if they cannot they have no case. That part of their case, as also before shown, has not been denied in the necessary manner by answer to be effective to defeat the case upon that point, and there is no evidence before the court, upon that or any other point, to make it appear at all that parties have been either improperly or collusively made or joined for the purpose of creating a case within the jurisdiction. There is nothing before the court now on which the court is authorized to act under the provisions of that section.

The pleas and demurrer are overruled; the defendants to answer over by the first day of next term.

## WEBB and others v. VERMONT CENTRAL R. Co. and others.

(Circuit Court, D. Vermont. October Term, 1881.)

1. TRUSTS — ACTION BY CESTUI QUE TRUST IN HIS OWN NAME — WHEN IT CAN BE MAINTAINED — DEMURRER.

A bill in equity is not demurrable because brought by a *cestui que trust* in his own name and on his own behalf, where it appears in the bill that the trustees have acquired adverse interests and been made defendants.

In Equity.

*William G. Shaw and Francis A. Brooks*, for orators.

*Benjamin F. Fifield and Daniel Roberts*, for defendants.

WHEELER, D. J. The defendants, the Vermont Central Railroad Company, the Central Vermont Railroad Company, John Gregory Smith, Worthington C. Smith, and James R. Langdon, demur to the bill, and the cause has been heard upon the demurrer. The orators are second-mortgage bondholders of the Vermont Central Railroad. The defendant John Gregory Smith is a trustee in the first mortgage; Worthington C. Smith is a trustee in the second mortgage; and both of them and the defendant Langdon are officers in the Central Vermont Railroad Company, which is in possession received from the trustees of the first mortgage.

One cause of demurrer assigned is that the bill does not show sufficient reason for the bondholders to proceed in their own names and behalf. But the bill does show that the trustees have acquired adverse interests and stand in a hostile position, so that they cannot maintain the orators' rights without attacking their own. They could not be orators against themselves, and this is a sufficient reason for making them defendants where the orators' interests were in suit, and with them as defendants there would be no one to prosecute the orators' claims but the orators themselves. The bondholders are the real owners of the mortgage interest, and the trustees have but a dry legal title, and when they hold that title in opposition to the bondholders the latter have good ground for proceeding in their own behalf to protect such rights as they have, and the proper position of the trustees in the proceedings is with defendants. This cause of demurrer cannot prevail.

Another ground is a want of equity in the case made by the bill generally. While being considered on this question the bill cannot be aided by what is stated elsewhere or by what is known in some other way, but must stand alone for examination, with all its allegations taken for this purpose to be true. It states the prior mortgage

as a valid encumbrance prior to the second mortgage, and that the trustees of the first mortgage were rightfully in possession by virtue of that mortgage; and that they procured their possession to pass to the Central Vermont Railroad Company. The orators' rights are subordinate to the first mortgage, and to those of the first-mortgage trustees, and all holding under them. As against such they have no right but to redeem, and this bill is not adapted to that purpose. It has not the proper allegations, offers of payment, nor parties. The bill states proceedings of court by which the Central Vermont was placed in possession, but alleges that they were all void as to the orators, and alleges that they were had at the instance of the trustees in the first mortgage, and that the Central Vermont claims to hold possession by the force of the proceedings.

This does not show the Central Vermont to be in possession as a mere wrong-doer, subject to the rights of any owner, with none of its own. It would not lose the rights it had by claiming to hold under those it had not. If the proceedings were void they conferred no right, but those who made use of them to transfer possession would, by the act, pass such possession as they had to pass, and the possession taken would be good as theirs because they gave it, although there was nothing else to uphold it. Thus the possession of the Central Vermont appears to be the same as that of the first-mortgage trustees, and such that the second-mortgage bondholder cannot, upon the allegations of this bill, disturb it without redeeming the first mortgage. They cannot foreclose their mortgage against either, because they both stand upon a mortgage which is prior to theirs. The bill states a transaction by which an agreement and a decree upon it were made providing for payment of rent, then of the first mortgage, and then of the second mortgage, by those in possession, and that the Central Vermont is under that duty, but does not state that anything has been received to apply upon the second mortgage, and does not pray for an account, so there is no ground for relief in that direction.

It states that the first mortgage has been enlarged against the rights of the second-mortgage bondholders, and that the trustees and the Central Vermont hold securities which they claim to be a prior lien to the second mortgage, and which are not; but as the orators do not seek to redeem such prior encumbrances as they have which are valid, there is no relief to be afforded by determining the validity of any, and no ground for making such a determination.

The bill shows a right to foreclose the mortgage against the mort-



gagor, and to have the trustee a defendant for that purpose, and shows no other ground for relief.

The demurrer of the Central Vermont Railroad Company and John Gregory Smith and James R. Langdon is sustained, and that of the Vermont Central Railroad Company and Worthington C. Smith is overruled.

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DWIGHT and others v. SMITH and others.

(Circuit Court, D. Vermont. October Term, 1881.)

1. MORTGAGE BONDHOLDERS — TRANSFEREES — PERSONAL CLAIMS AGAINST THE TRUSTEES.

Personal claims, by holders of mortgage bonds, against trustees in the mortgage on account of the bonds, do not pass to persons subsequently acquiring such bonds, unless by an agreement to that effect.

In Equity.

*Francis A. Brooks and William G. Shaw*, for orators.

*Benjamin F. Fifield and Daniel Roberts*, for defendants.

WHEELER, D. J. This cause has been heard upon a demurrer to the bill of complaint for want of equity in favor of the orators, generally, and for want of sufficient definiteness in stating the grounds for the relief claimed. The bill alone is to be looked at in determining the questions so raised. According to the bill the orators are now holders of the first-mortgage bonds to a large amount, but when they became such holders is not shown. Some of the defendants are trustees in that mortgage; others are the representatives of a trustee, deceased; another defendant is the Central Vermont Railroad Company, alleged to be in possession of the mortgaged property; others are directors in the latter corporation. The trustees have both neglected and violated their duty to the first-mortgage bondholders, while in possession of the mortgaged property, in not accounting to them for moneys received by them as trustees for them, and in delivering the property to the Central Vermont Railroad Company against their rights and expressed wishes. And the Central Vermont Railroad Company has received the income of the mortgaged property and not accounted for it; and its directors, made defendants, have participated in that act.

If the trustees received income from the mortgaged property belonging to the bondholders and to be distributed to them, the

money would belong and be distributed to the persons who were at that time bondholders, and the right to it would not pass to persons subsequently acquiring the bonds, unless they expressly acquired the right to it also. The claims of the bondholders against the trustees would not be upon the bonds themselves, like the claims against the obligors in the bonds, although they would be on account of the bonds, but would be claims against the trustees personally for the moneys received to the use of the bondholders, and these claims would not be assignable at law, although they might be in equity. In a suit or proceeding upon the bonds themselves, the production of the bonds and coupons, or the allegation of their ownership, might import that the holder had held them at the time of the accruing of the interest incidental to the debt, and entitle him to recover for the whole; but not so as to a claim not upon the bonds, but for money received to the use of the bondholders. The production of the bonds would not make out a cause of action or claim for relief on account of that money. More would have to be shown, and enough more to make out a cause of action or ground for relief, and that would include showing a right to the money at the time it was received. The orators fall short of showing such right. And if the orators had been holders of the bonds ever after they were issued, and had so shown in their bill, it would be incumbent on them to show that their trustees, or those holding the property in place of the trustees, did receive money belonging to them, or did so conduct themselves with the property as to make themselves accountable for money as if they had received it. The bill does not allege that the trustees received any money belonging to the bondholders prior to their appointment as receivers, nor that while they were in fact receivers they received anything more than enough to pay the Vermont & Canada rent, which was to be first paid; nor that they ceased to be receivers in fact until the making of the compromise agreement, nor then otherwise than by the force of that agreement. That agreement is annexed to the bill and made a part of it. The bill does not show that the orators are not bound and willing to stand upon that agreement. If they are, then, as to them, the income raised afterwards was to be distributed according to that agreement. Some of that income was to go to the Vermont & Canada Railroad Company for rent; how much, does not appear. A gross amount of income for a term of years is stated; but whether that amount was greater than the amount of rent to be first paid is not shown or stated. The same

would be true if the compromise agreement was not binding upon them. The amount to be paid before anything would remain to apply on these bonds would not appear, and consequently whether anything would be left to go to the bondholders would not in either case appear. The bill should show definitely and distinctly, not merely a right in somebody to equitable relief, but a right in the orators to equitable relief against the defendants.

The demurrer is sustained.

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**GRISWOLD and others v. CENTRAL VERMONT R. Co. and others.**

*(Circuit Court, D. Vermont. October Term, 1881.)*

**I. STATE AND FEDERAL COURTS—CONFLICT OF JURISDICTION.**

The fact that the property is being administered upon in proceedings taken in a state court, and that the plaintiff might apply to that court for relief, is no bar to the institution of proceedings in the circuit court of the United States.

In Equity.

*Prout & Walker*, for orators.

*Benjamin F. Fifield, Geo. F. Edmunds, and Daniel Roberts*, for defendants.

**WHEELER, D. J.** The orators are citizens of New York, and executors in that state of George Griswold, late a citizen of that state, and bring this bill to enforce liens upon rolling stock and earnings of rolling stock of the Vermont Central and Vermont & Canada Railroads, pledged by some of the defendants while in possession of those roads and the Central Vermont Railroad Company, their successor in possession, by consent of parties and order of the court of chancery of the state of Vermont thereupon, for the security of several series of equipment loans in which the orators, as executors, invested.

Some of the defendants have demurred, assigning for cause that owners of the different series of bonds have no common interest in the securities; that the bonds are not referred to as a part of the bill, nor made a part of, nor attached to, the bill; that the doings of the managers in possession prior to the possession of the Central Vermont Railroad Company cannot properly be joined with the doings of that company; and that on the face of the bill it appears that this court has not jurisdiction.

The Central Vermont Railroad Company has pleaded the proceedings of the state court of chancery in bar to the jurisdiction of this

court, from which it appears that some of these defendants, with other persons, were made receivers of these roads in a cause pending between the Vermont & Canada Railroad Company and its security-holders; that while so in possession an agreement was made between the parties and embodied in a decree of the court under which those in possession and their successors were continued in possession, and by one of the provisions of which the cause in which the proceedings had been taken was kept in court, with liberty to any party to apply to the court for further orders as they might be advised; that in the proceedings authorizing these loans, and as a part of the decrees under which they were issued, it was provided that in case the trustees should fail to pay the notes or interest, the holders might apply to that court for the realization of their securities, or for a summary order for the payment of the amount due out of any property in the hands of the trustees, and that a copy of this part of the decrees was printed upon and made part of the notes.

The cause has now been heard upon these causes of demurrer and this plea.

The causes of demurrer do not require any extended notice. The claims are asserted in favor of the same parties against the same parties to enforce a common trust. The Central Vermont Railroad Company succeeded to the duties of its predecessors in respect to the property, and still the predecessors were not discharged, therefore all are connected, and all are properly joined. If the bonds or notes are sufficiently set forth to show their terms and effect, that is enough without reciting them, further referring to them, or attaching copies of them; and it is not pretended but that they are so set forth. The question as to the jurisdiction of this court is involved and included in that made by the plea, except as to a question made whether the orators, being executors in the state of New York, can sue out of that state. This does not involve any question as to whether they so succeed to the right of their testator out of the state where they are executors, that they can represent him and recover upon his rights elsewhere. These rights never accrued to him at all. They accrued to the orators themselves, and accrued to them in the same capacity; and, for aught that appears, in the same place in which they are attempting to enforce the rights.

Letters of executorship or administration extend only to the goods or estate which were of the testator or intestate at the time of decease, and would not include these securities, if taken out in Vermont, as against the rights of the orators.

As to the other question of jurisdiction, as the parties are citizens of different states the amount in dispute is large enough, and this court has and is bound to take jurisdiction when a proper case is brought, unless there is something in the nature of the case or situation of the property that excludes the jurisdiction. It is argued for the defendants that those contracting the debts were still the receivers of the court; that they contracted the debts as such; that all the property from which the debts were to be paid was in their possession as receivers; that no other court could reach the property to afford relief for non-payment; and that the provision for relief in the order authorizing the loans, and made a part of the notes, excludes all other remedies. The jurisdiction of courts is given by the law and not by the parties, and can neither be conferred nor taken away by their mere consent or agreement. If the conditions prescribed by the law for jurisdiction exist, the jurisdiction exists. The conditions prescribed for giving this court jurisdiction of the parties exist, and jurisdiction of the case must follow unless the subject is out of reach. Neither by the terms of the securities as set forth in the bill, nor as shown in the plea, nor by the conditions of the proceedings, was anything to be done by the court before the defendants could carry out their obligation to set apart the earnings of the rolling stock as agreed and apply them to the satisfaction of these notes. They were at liberty to do it, and, so far as appears, were bound to do it. If there was a failure, the holders of the notes would have a right to apply to the courts of the land for relief, and they would not be deprived of the right to apply to any one court because they had the right to apply to another. Those which were provided were provided for the purpose of giving the right to apply to them. There is nothing to prevent applying to this court, unless it may be that, as is argued, the property is in the course of administration of the state court. It is, however, well settled that the fact that property is being administered upon in state proceedings does not prevent citizens of other states from proceeding in the circuit courts of the United States to establish their claims and obtain relief if entitled to it. *Suydam v. Broadnax*, 14 Pet. 67; *Erwin v. Lowry*, 7 How. 172. In *Shelby v. Bacon*, 10 How. 56, the assets of an insolvent corporation were being administered, under the laws of Pennsylvania, by assignees accountable to the state court of common pleas. The assignees refused to allow the claim of the plaintiff, and he brought suit in the United States circuit court, to which the assignees pleaded the pendency of the state proceedings. After noticing some defects in the

plea, Mr. Justice McLean, in delivering the opinion of the court, said:

"But if the plea had been perfect in this respect it would not follow that the complainant could not invoke the jurisdiction of the circuit court. He, being a non-resident, has his option to bring his suit in that court, unless he has submitted, or is made a party in some form, to the special jurisdiction of the court of common pleas. It appears from the bill that the assignees have refused to allow the claim of the plaintiff, or any part of it. To establish this claim as against the assignees the complainant has a right to sue in the circuit court, which was established chiefly for the benefit of non-residents. Not that the claim should thus be established by any novel principle of law or equity, but that his rights might be investigated free from any supposed local prejudice or unconstitutional legislation. On the most liberal construction favorable to the exercise of the special jurisdiction, the rights of the plaintiff in this respect could not, against his consent, be drawn into it."

In *Mallett v. Dexter*, 1 Curt. 178, sometimes relied upon to avoid the jurisdiction of the circuit court, jurisdiction was entertained in favor of a non-resident to reopen accounts of administrators, settled in the probate court of Rhode Island, on the ground of fraud, although it was refused as to accounts then actually in process of settlement in the state court. *Union Bank v. Jolly*, 18 How. 503; *Hyde v. Stone*, 20 How. 170; *Payne v. Hook*, 7 Wall. 425.

According to the allegations of the bill, a particular fund was to be set apart for the payment of the orators' notes, which was not set apart, or if set apart has not been applied to that purpose. The orators have the right to apply to the federal courts, on account of their citizenship, to have their claims investigated. The merits of their claims are not yet before the court, and cannot be until answer and proofs are made. The only question now is whether the case shall proceed to answer and proofs. Nothing is seen adequate to deprive the orators of their right to resort to the federal courts, in common with all citizens, no one state having or claiming to have cause of action against citizens of another state to have their causes tried.

The demurrer and plea are overruled; defendants to answer over by the first day of next term.

**FORSYTH and another *v.* PIERSON and others.**

(*Circuit Court, D. Indiana.* January 17, 1882.)

1. ORDER FOR APPEARANCE OF NON-RESIDENT DEFENDANTS IN CERTAIN EQUITY SUITS UNDER SECTION 8, ACT OF MARCH 3, 1875, (18 ST. AT LARGE, 472.)

A marshal's return of "not found" in the district where the suit is brought is not a condition precedent to the making of the order contemplated by the act of March 3, 1875, § 8, (18 St. at Large, 472.) Such order may be made upon a proper showing by affidavit alone.

2. SAME—RETURN-DAY.

The court may, in such order, fix any day certain for the appearance of the non-resident defendant, and is not limited to the usual rule-days in equity.

3. SAME—SERVICE OF.

Such order is not a "subpoena" or "process" within the meaning of rule 15 or 17, requiring service by the marshal or his deputy of the district where the suit is brought, or by some one specially appointed therefor by the court. No particular mode of service or proof thereof is prescribed by the act. Service by the marshal or his deputy of the district whereof the non-resident defendant is an inhabitant, or wherein he is found, and the return thereof in the usual form or by affidavit, are sufficient.

In Chancery.

*J. R. Doolittle, Jr., and McDonald & Butler*, for complainants.

*Baker, Hord & Hendricks*, for intervening petitioners.

*Grant, Swift & Bradley*, for defendants.

GRESHAM, D. J. The complainants filed their bill of complaint against the defendants on the eleventh day of November, 1881, to enforce their right to redeem certain real estate, situated in Indiana, from a mortgage, both of which are described in the bill. At the same time the East Chicago Improvement Company filed its intervening petition setting up that it was the owner of the mortgaged premises by mesne conveyances from the complainants, who were the mortgagors, and that it desired to make various permanent and expensive improvements upon the premises, which could not be made while the mortgage remained upon the property. The petitioner paid into court \$75,000, which, added to \$135,000 already paid in by the complainants, was, the petitioner averred, more than sufficient to pay the amount that was claimed to be due upon the mortgage. The prayer of the intervening petition was that the lien of the mortgage should be transferred from the lands to the fund in the registry of the court, and that the mortgagees should be decreed to enter satisfaction of their mortgage.

At the time the bill and intervening petition were filed, J. R. Doc-

little, Jr., Esq., one of the complainants' solicitors, filed his affidavit describing the complainants' cause of action, and stating that John O. Pierson, one of the defendants, was a resident of the city of Chicago and state of Illinois; that the Continental Life Insurance Company was a citizen of the state of Connecticut, and that certain other defendants were citizens of Boston, in the state of Massachusetts; that neither said non-resident defendants, nor either of them, could be found in the district of Indiana, nor did they, or either of them, voluntarily appear to the complainants' bill of complaint. On the information contained in this affidavit the court entered an order that the defendants named in the affidavit appear and plead, answer or demur, to the bill and intervening petition on or before the seventh day of December, 1881, and that a copy of the order should be served upon each of such defendants. Certified copies of this order and the bill of complaint and intervening petition were served upon the Continental Life Insurance Company, in Connecticut, on the sixteenth day of November, 1881, by the marshal for the district of Connecticut.

Samuel C. Hays, in an affidavit in which he describes himself as deputy United States marshal for the northern district of Illinois, swore that he made similar service on John O. Pierson on the same day. And B. B. Johnson made affidavit of similar service at Boston on the seventeenth day of November, 1881, on the defendants, who were citizens of that place, describing himself as deputy marshal for that district. Mr. Johnson also indorsed the usual return of service upon the certified copies of the order, bill, and intervening petition, which were placed in his hands as deputy United States marshal for the district of Massachusetts.

The defendants now appear specially and move to set aside the order of the court and the service of the same, for the reason that the order was prematurely made; that it was not based upon proper information; that the day designated for the defendants to appear and plead was not a rule-day; that the service should have been by the marshal of this district, or by a person specially named in the order to make the service; and that the intervening petition is not such a proceeding as is contemplated by the act of March 3, 1875. This act provides that when any defendant in a suit in equity to enforce any equitable lien or claim against real or personal property in the district where the suit is brought is not an inhabitant of nor found within the district, and does not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear and plead, answer or demur, to the complainant's



bill on a certain day therein to be designated; and the said order shall be served on such absent defendant wherever found, or where such personal service is not practicable shall be published in such manner as the court shall direct. If the absent defendant fails to appear and plead within the time limited, the court is authorized to entertain jurisdiction and proceed to the hearing of the suit.

The act is silent on the subject of the evidence that will authorize the making of an order for substituted service. The marshal's return to a subpoena that one or more of the defendants cannot be found within the district would, no doubt, authorize the court to enter such an order. But this is not the only evidence that will authorize the court to enter an order for substituted service. An affidavit such as was produced in this case is sufficient evidence that the defendants named in it are not inhabitants of the district. When it is made to appear at the commencement of the suit, or at any subsequent time, that a defendant is not an inhabitant of the district, and cannot be found within it, and will not, or does not, voluntarily appear to the suit, an order may be entered specifying a day for such defendant to appear and plead, answer or demur. It is not necessary to wait and see if the absent defendant will not voluntarily enter his appearance, or that he may be found and personally served with process in the district. It is urged that equity rule 17 fixes the appearance-day for defendants in all equity cases. "The appearance-day of the defendants," says this rule, "shall be the rule-day after the subpoena is made returnable, provided he has been served with the process 20 days before that day. Otherwise his appearance-day shall be the next rule-day succeeding the rule-day when the process is returnable."

The act says the absent defendant shall be ordered to appear on a day to be designated in the order—not on a rule-day. And, furthermore, the order for the appearance of the absent defendant is not a subpoena or process within the meaning of rule 17 or rule 15, which provides that the service of all process, mesne and final, shall be by the marshal of the district, or by his deputy, or by some other person specially appointed by the court for that purpose. The language of the act is: "And the said order shall be served on such absent defendant, if practicable, wherever found; or, when such service is not practicable, shall be published in such manner as the court shall direct." The order is nowhere referred to as process, and no particular service or proof of service is required. The residence of each of the absent defendants was given in Mr. Doolittle's

affidavit, and it was, therefore, practicable to serve each of them personally with a copy of the order, which was done. I think the act has been sufficiently complied with to give the court jurisdiction over the property described in the bill, and the rights of the absent defendants thereto. If it becomes necessary, the question arising in connection with the intervening petition can be determined hereafter.

Motion overruled.

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UNITED STATES *v.* RICHARDSON and others, Ex'rs.

(*Circuit Court, D. Massachusetts.* January 23, 1882.)

1. CONTRACTS—OFFER TO PAY—"ALL CLAIMS"—EXECUTORS—SURVIVAL OF CAUSES OF ACTION—PENALTIES AND FORFEITURES—DUTIES.

W., an importer, against whom a personal action was pending in the district court of the United States for penalties alleged to have been incurred on account of certain importations of tobacco, made an offer to the government to pay a certain sum on the suit in the district court in settlement of all claims it had against him. The government agreed to settle all the known claims, specifying them, for that sum, requiring immediate payment, and that part of the sum so paid be considered as having been paid for duties, and the remainder only as a penalty. Soon afterwards W. died; before either he had paid the money or the government had tendered him a release. In an action against his executors, in which both parties agree that all suits and causes of action for penalties and forfeitures died with W., and that the right of action for duties survived, it was *held*: (1) that the acceptance conformed to the offer; (2) that as no tender of a release had been made by the government before the death of W., and after that occurred the occasion for a release had passed, the contract was not binding upon the executors.

At Law.

*Geo. P. Sanger*, U. S. Atty., and *Prentiss Cummings*, for the United States.

*Sydney Bartlett* and *Henry D. Hyde*, for defendants.

LOWELL, C. J. Action of contract. The first count of the declaration alleges that in May, 1872, a suit for penalties was pending in favor of the United States against Way, the testator of the defendants, in the district court at Boston; that claims were made for penalties and duties in respect to certain importations of tobacco; that the testator offered to pay the plaintiffs \$55,000 in settlement of all said claims and causes of action; that upon due report by the district attorney, and upon the recommendation of the solicitor of the treasury, the secretary of the treasury accepted said offer, May 29, 1872; that the acceptance was notified to Way, June 1, 1872, and

was by him thereupon duly ratified and confirmed; that the defendants, as executors of said Way, owe said sum to the plaintiffs. The second and third counts allege a promise to pay \$55,000, in consideration of an agreement that the plaintiffs would forbear to sue Way, and that they have so forborne.

The answer sets up four defences:

(1) A denial of the contract. (2) No performance, or offer to perform, by the United States, during Way's life. (3) That in violation of the contract, if any was made, the plaintiffs have sued the defendants for a part of the sums alleged to be due from Way. (4) That after Way's death a compromise was duly made by the plaintiffs with these defendants, as executors, which took the place of the compromise declared on.

The cause was tried by the court. I find the following facts:

An information was filed in the district court here, October 25, 1871, against 1,291 bales of tobacco, imported by the brig *Star*, for a fraud said to have been attempted by Way in bribing a weigher to make a false return. Way claimed the goods, and received them upon giving bond, with sureties, for \$100,000, which was their agreed value. April 1, 1872, a default was entered, and Way was ordered to pay into court, within 20 days, the \$100,000 and costs. Several payments were made; the last instalment of the damages May 18, 1872, and the costs May 27, 1872. At this time a personal action was pending by the United States against Way for penalties said to have been incurred in some other importations of tobacco, to the amount of \$300,000.

In a letter dated May 8, 1872, Way offered the secretary of the treasury to pay \$100,000 in full compromise and settlement of the judgment, and of all fines, penalties, and forfeitures incurred by reason of certain importations of tobacco, enumerated in his letter; also, all duties due on said importations.

The offer having been referred back to Mr. Mason, district attorney, he wrote to the solicitor, May 18th, explaining that the United States had already recovered \$100,000 for an attempted fraud, by which they had lost nothing; that the duties due the government were small; but yet that he would not recommend an acceptance of the offer of May 8th; but he did recommend the secretary to accept an offer of \$55,000, which he inclosed, in these words: "May 18, 1872. I hereby propose to pay \$55,000 on the suit against me in the district court in settlement of all claims of the government against me."

Mason wrote, May 24, 1872, making further explanation of the case, and saying that the gross duties due were about \$25,000, but, after allowance for tare, etc., would be about half that sum; and again advising to accept the \$55,000. He said, besides, that the proposal to release "all claims" was intended by him to include only the tobacco importations; that he knew of no others, nor could Way have anticipated a settlement of unknown claims. May 27th Mason sent a telegram to the solicitor: "If you accept Way's offer, please make condition immediate payment." May 27th Mr. Banfield, the solicitor, wrote the secretary, referring to both offers, and advising him to accept the second, "with the proviso that the matter be submitted to the proper

officer for an estimate of the duties withheld upon the several lots of tobacco involved, and that these be paid into the treasury and the balance to be treated as a penalty." May 28th the secretary wrote the solicitor: "I have received your communication of the twenty-seventh instant, returning the proposal of Mr. Samuel A. Way, of Boston, to pay one hundred and fifty-five thousand dollars, (\$155,000,) as a settlement of all claims of the United States in consequence of the illegal importation of a quantity of tobacco at Boston, in the vessels and at the times designated below." Then follows a list, as in Way's letter of May 8th, and a statement of the facts showing the propriety of the settlement, adding: "In consideration of those facts, and the recommendations by yourself, the United States district attorney, and the collector of customs at Boston, respectively, in favor of the settlement, I have concluded to compromise the claims on the basis proposed, and you are requested to instruct the district attorney accordingly." He directs that the duties due the United States shall be deducted by the collector of customs, and the residue of the sums received should be treated as the proceeds of fines, penalties, and forfeitures. In calling the offer \$155,000, the secretary included the \$100,000 already paid.

May 29, 1872, the solicitor inclosed a copy of this letter to Mr. Mason, and instructed him to cause the compromise to be carried out in the manner therein indicated; "the money to be paid at once, and the duties remaining due on the several importations to be estimated by the collector of customs, and deducted and paid into the treasury as duties, the balance to be treated as a penalty, etc. Please report to this office upon settlement being made as directed."

These letters were received by the district attorney on Saturday June 1, 1872, and Way was overheard discussing or disputing with him, on that day, about terms of payment, from which I infer that the letter of the secretary, or its substance, had been communicated to him. I do not find, in the terms of the declaration, that the acceptance was by him thereupon duly ratified and confirmed. I do not know whether it was confirmed or not.

Way attended to no business after that Saturday. He was taken ill on Sunday and died on Tuesday. Mr. Mason died during the next year.

The defendants, as executors of Way, made several written offers to the secretary. January 31, 1873, they offered to pay \$11,000 in gold, in full settlement and compromise of all suits, claims, dues, duties, penalties, and demands of the United States against Way or his estate, heirs, or executors. This offer was referred to Mr. Hurd, assistant district attorney, and, while he was considering it, a fresh offer was made to him and transmitted with his report, and he advised its acceptance. His report was elaborate, expressing the opinion that the suit for \$300,000 penalties had abated by the death of Way; that the court would not be likely to enter judgment for \$55,000 *nunc pro tunc*, in that suit, because it would be a great hardship to enforce such an agreement made under circumstances of excitement, etc.; that no action could be maintained on the compromise as a contract. The offer which he approved was to enter judgment for the United States, in the pending suit, for the sum of \$13,500. The solicitor answered, February 17, 1873, that the secretary rejected this offer; that the \$13,500 was the estimated amount of

duties, and should not be recovered as a penalty; and, besides, that he desired the question of the liability of the estate of Mr. Way for the \$55,000 offered by him, and accepted by the government before his death, should be tested and disposed of by a judicial determination.

There the affair rested for some time, one of the executors of Way having become secretary of the treasury.

October 5, 1874, Mr. Hyde, attorney for the executors, wrote a letter, dated at Washington, to Mr. Bristow, then secretary of the treasury, reciting briefly the history of the case as shown by the papers on file, and offering to pay, in settlement of the pending suit, (though claiming that it had, technically speaking, abated,) such sum as should be found due to the United States for duties by a master, or auditor, to be appointed by the court. October 8, 1874, Mr. Wilson, then solicitor of the treasury, in a report to the secretary upon this offer, recommended its acceptance on the ground that the suits and claims for penalties had died with Way, and that the compromise might probably have gone too, but if not, it would be harsh and unconscionable to exact the \$55,000, under all the circumstances. October 13, 1874, he notified the district attorney, Mr. Sanger, of this offer, and that the secretary had accepted it, and asked Mr. Sanger to name some suitable person as master or auditor. Mr. Sanger named Mr. Bassett, deputy clerk of the district court, and he was agreed on, and the court, at the request of both parties, made the order of reference. Mr. Bassett had one or more hearings in the case, but some disagreements arose between the parties, and the government declined to proceed further, and brought a suit for the duties, and this suit for the \$55,000. The action and order of reference are still open on the docket.

The pleadings in the present action, and the several letters above mentioned, are made a part of this statement of facts.

It has been discovered, since Way's death, that he owed the government about \$300 for an inadequate payment caused by a mistake of the officers of the customs in respect to an importation of veneers.

Upon these facts the defendants contend that the acceptance did not conform to the offer, and as there is no sufficient evidence that Way consented to a change, the agreement was not complete. The variations were that the government agreed to release, specifically, all the known claims, instead of "all claims;" that it required immediate payment; and that a part of the sum paid be considered as having been paid for duties, and the remainder only as a penalty. These variations do not seem to me material, or rather to be variations. "All claims" must be construed to mean known claims, else the agreement might be a mere leap in the dark. An offer to pay, without more, means cash. With the mode in which the sums paid should be divided, the defendant had no concern.

Both parties agree that all suits and causes of action for penalties and forfeitures died with Way, and that the right of action for duties survived.

The contract, then, was complete. In substance, it was that if the defendant would pay \$55,000, immediately, the government would release him from all known claims. It was not a contract by which, in consideration of his promise to pay, they released him, or even promised to release him; or to forbear to sue him or his executors. If he had retracted his consent on Monday, they would have prosecuted their suits for penalties as well as duties. They did not intend to release those suits and claims, which, if he had lived, would have been their best security. Still, it was a contract; and if Way had immediately tendered the money to the government, he might have pleaded the contract and tender in bar of the suit or suits; and, on the other hand, if the government had chosen to tender to Way a release of all claims, I do not see why they might not have sued him on the contract. They made no such tender then, or since, and when Way died the occasion for a release was gone; there was no longer a large unliquidated claim to be relieved by the payment. In this state of things I decide that there was no contract binding the executors to pay \$55,000 to the government.

As to the second compromise, the objection is taken by the government that there was no report upon it by the district attorney, as required by the statute, (now Rev. St. § 3469.) But there was a full and elaborate report and recommendation by Mr. Hurd upon a similar offer; and it is upon this report that the solicitor founded his own. This is plain upon the face of the papers. The offer thus reported on was not only similar, but, in substance, identical. It was to submit to a judgment for \$13,500, the estimated amount of duties; and the accepted offer was to submit to a judgment for the amount of the same duties, to be ascertained by an auditor. There had been, therefore, a substantial compliance with the statute. Whether the new compromise was one which, in law, would have superseded the old one, if that had been of binding force after Way's death, I have no occasion to decide. Judgment for the defendants.

## SECOR and others v. SINGLETON and others.

*(Circuit Court, E. D. Missouri. December 6, 1881.)*

## 1. DEMURRER TO BILL—VERIFICATION—EQUITY RULE 31.

A demurrer to a bill in equity should be certified by counsel to be, in their opinion, well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay.

## 2. TAXATION—DECISIONS OF STATE COURTS GOVERN.

The decision of the highest court of a state upon a question of local taxation is conclusive.

## 3. SAME—EXEMPTIONS.

Where the stock of a company is by law exempt from taxation, its property cannot be taxed.

*Scotland County v. Missouri, Iowa & Nebraska R. Co.* 65 Mo. 120.

## In Equity. Demurrer.

The bill alleged that the Alexandria & Bloomfield Railroad Company was duly incorporated by an act of the general assembly of the state of Missouri, and that by a provision of its charter its stock was made exempt from taxation for the period of 20 years after its completion, which period has not yet expired; that said road ran through the counties of Clark, Scotland, and Schuyler, in the state of Missouri, to a point on the northern boundary line of said state; that said company was afterwards consolidated, under the laws of Missouri and Iowa, with the Iowa Southern Railway Company, a corporation in the state of Iowa, and has been since known as the Missouri, Iowa & Nebraska Railway Company; that by virtue of the laws of said states the consolidated company became entitled to all the privileges and immunities of the original corporations; that said Iowa & Nebraska Railway Company has no property in said counties of Clark, Scotland, and Schuyler, except its road-bed and other property used in the operation of its road; that taxes had been illegally assessed against said property, and that the defendants, the auditor of the state of Missouri, the judges of the county courts of said counties, and others, have combined to compel said company to pay taxes in said counties upon its property therein situated, and had employed attorneys to institute and maintain suits for taxes assessed against said property; that the complainants owned a large amount of stock in said company, and had requested the directors and officers of said company, and said company, to refuse to pay said taxes, and to take proper steps to resist the imposition of taxes upon said property, but that they had refused to take any such steps; and that said company had, through its officers, announced its intention to pay said illegal taxes. The prayer of the bill was that the taxation of said company's property should be declared illegal, and the acts of the auditor and the county officers void and of no effect; and for a writ of injunction to restrain the defendants from taking any steps towards the assessment of taxes upon the property of said road, or the collection thereof. The defendants demurred to the bill upon the ground that it set forth no ground of action or complaint against them. The

demurrer was not certified by counsel to be, in their opinions, well founded in point of law, nor was it supported by the affidavit of the defendants that it was not interposed for delay.

*Baker & Hughes*, for plaintiffs.

*Waldo P. Johnson* and *H. A. Cunningham*, for defendants.

TREAT, D. J. A so-called demurrer was filed to the amended bill in this case on April 1, 1880, not in conformity with rule 31, United States supreme court. The plaintiff might have moved, therefore, more than a year ago, for a decree *pro confesso* as to said demurrants. That so-called demurrer is now submitted and overruled. An examination of the case satisfies the court that if said demurrer had conformed to the rules, it would not have been well taken. It was interposed, obviously, for mere delay, inasmuch as the only legal question involved had been decided, as set out in the bill, (65 Mo. 123,) adversely; which decision this court recognizes as conclusive on a question of state taxation.

To the amended bill, filed January 7, 1880, only one answer has been filed, which is a general denial, couched in the form of an answer to a law action in the state court, and not sworn to. No replication thereto has been filed; so the case has been suffered to float. More than a year ago the plaintiff could have had, by proper motion, a decree *pro confesso*: (1) Because the so-called demurrer was no demurrer in conformity with the rules of the supreme court; and, even if it were, it was not well taken, under the conclusive rulings of the supreme court of Missouri. (2) Several of the defendants had interposed no answer to the amended bills. (3) The only defendant purporting to answer, interposed merely a general denial to the allegations of the bill, to which there should, possibly, have been a *pro forma* replication. Such practice as a general denial in form of a general issue is wholly unknown in equity; and, whether allowable or not, the case might have been set down for hearing on the pleadings, with such evidence as had been presented within the time prescribed for taking the same. If such a denial as to Holliday puts the party to a formal replication and proofs, the said defendant could, on motion, have the case dismissed as to him. But the manner in which these faulty proceedings have been pursued induces the court to permit, on terms, further action to be had, so far as the same may pertain to the merits, and no further.

The demurrer will be overruled, at the cost of the demurrants. Plaintiffs may take such further action as they may deem necessary.



PRESIDENT AND DIRECTORS OF THE INSURANCE COMPANY OF NORTH  
AMERICA v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RY. CO.

SAME v. SAME.

SAME v. SAME.

(Circuit Court, E. D. Missouri. January, 1882.)

1. COMMON CARRIER—BILL OF LADING—NEGLIGENCE.

A provision in a bill of lading, issued by a common carrier, to the effect that the carrier shall not be liable for loss by fire, will not exempt it from liability for a loss by fire occurring through its negligence.

2. SAME—NEGLIGENCE.

Where a common carrier undertakes to transport cotton for hire upon open flat cars, it is bound to take all needful precautions for the cotton's safety and protection.

3. SAME—SAME—MEASURE OF DAMAGES.

Where cotton in course of transportation by a common carrier was destroyed by fire in consequence of the carrier's gross negligence, and the owners assigned and transferred their interest in said cotton and their rights against said carrier to a fire insurance company, by which the cotton was insured, upon its indemnifying them for the loss sustained, *held*, that the insurance company was entitled, as against the carrier, to the value of the cotton at the time of the loss, with 6 per cent. interest from the day upon which the cotton would probably have been delivered to the owners if it had not been destroyed.

The facts alleged in the petitions in the above entitled cases are, so far as it is thought necessary to set them out here, substantially as follows:

Certain bales of cotton, owned by different parties in each case, were lost while in the custody of the defendant, a common carrier, and while being transported by it for hire.

At the time of the loss the cotton was covered by certain policies of insurance issued by the plaintiff, and upon its paying certain sums to the owners of the cotton they assigned all their rights, titles, and interests in, to, and concerning it to said company. The owners of the cotton are alleged in said petitions to have been damaged in certain specified sums, and the insurance company asked judgment for the amount of damages sustained by them.

The answers deny the facts alleged in the petitions, and allege that the losses complained of occurred from fire, without negligence on the part of the defendant, and that it was expressly stipulated and agreed by the shippers of the cotton that the defendant should not be liable as a common carrier or otherwise for loss or damages caused by fire.

In the replies the affirmative allegations in the answers are denied, and gross negligence on the defendant's part is alleged.

A jury was waived and the three cases were tried together by the court sitting as a jury.

At the trial, it appeared from the evidence that the losses all occurred from fire, through the defendant's negligence in attempting to convey the cotton on open flat cars through woods which were on fire.

In the case referred to as the one in which the negligence was least culpable the conductor did not see the fire until very close to it, and there being no side track, went ahead. In the other cases the smoke arising from the fire could be seen at a distance, and the cars on which the cotton was loaded might have been left in safety upon a side track. The cotton would probably have been delivered to its owners, if it had not been destroyed, on or about January 10, 1877.

The amounts referred to in the opinion of the court are the sums which the different shipments of cotton were proved to have been worth at the time of the loss.

The allegations of the answers in reference to the provisions in the bills of lading as to the liability of the carrier by fire were proved.

*Robert Harbison*, for plaintiff.

*Porter & Pike*, for defendant.

TREAT, D. J. These cases were heard at the same time and rest mainly on the same general principles. Some of the evidence introduced was incompetent, it being merely hearsay, as contradistinguished from "verbal facts." Discarding all such, the main question decisive of the cases is as to the defendant's negligence. Although the shipment of cotton on open or flat cars may not be in itself such an act of negligence as would make the carrier liable under all contingencies, yet when such shipment is made, there is devolved upon the carrier the duty to take the additional precautions needed for the protection and safety of the cotton. In these cases it seems that not only was no such precaution taken, but that the train in two of the cases was hurried forward when fires were adjacent to the track, or sufficiently near to render it more than probable that so inflammable an article would be ignited and destroyed. In the other case the negligence, although not so gross, was extremely culpable.

As it is admitted that if the loss was caused by the defendant's negligence the plaintiff must recover, it is unnecessary to consider what effect, if any, the Texas statutes would have upon the exemptions in the bill of lading against loss by fire, so far as the defendant is concerned. Rev. St. Texas, 1879, p. 48.

Judgments for the plaintiff will be enforced for the respective amounts, with interest at the rate of 6 per cent. per year from January 10, 1877, with costs.

## BARNES and others v. HARTFORD FIRE INS. Co.

(Circuit Court, D. Minnesota. January, 1882.)

## 1. INSURANCE — SEPARATE RISKS UPON SAME PROPERTY — LAWS — MEASURE OF LIABILITY.

Where several insurance companies take separate risks upon the same property, and a loss occurs, the companies are liable in the ratio that their risks bear respectively to the total risk.

Action at law, tried before the court without a jury upon an agreed statement of facts.

*W. D. Cornish*, for plaintiffs.

*C. K. Davis*, for defendant.

NELSON, D. J. This suit is brought against the defendant upon an insurance policy, dated February 22, 1881, by the terms of which it insured the plaintiffs, as their interest might appear, against loss or damage by fire "to the amount of \$20,000 upon grain held by them in storage, or in trust, or on commission, or sold but not delivered, contained in elevators and warehouses situate on the lines of the Northern Pacific and St. Paul, Minneapolis & Manitoba Railroads, as per schedule herewith, as the same may be owned, controlled, or leased by the said assured."

The schedule referred to, and which was attached and made a part of the policy of insurance, was in words and figures as follows:

"On grain owned or held by them in storage, or in trust, or on commission, or sold but not delivered, contained in elevators, warehouses, situate on the lines of the Northern Pacific and St. Paul, Minneapolis & Manitoba Railroads, as per schedule herewith, as the same may be owned, controlled, or leased by the said assured.

"It is understood and agreed that, in case of loss under this policy, this company shall be liable only for such proportion of the whole loss as the amount of this insurance bears to the cash value of the whole property herein described and contained in the elevators and warehouses, in schedule herewith, at the time of the fire.

"Permission to clean grain, and to make ordinary alterations and repairs in and to any of the buildings named in this schedule, and to run at night when necessary. Other insurance permitted, without notice, until required.

## "SCHEDULE OF ELEVATORS AND WAREHOUSES.

Stations.	Kind of building.	Capacity in bushels.	Exposures. Detached feet.
Jamestown .....	Frame steam-power elevator.....	50,000	60
Spiritwood.....	Frame warehouse.....	15,000	100
Sanborn .....	Frame warehouse.....	10,000	100
Valley City.....	Frame warehouse.....	10,000	100
Valley City.....	Frame steam-power elevator.....	60,000	300
Tower City.....	Frame warehouse.....	12,000	100
New Buffalo.....	Frame warehouse.....	5,000	100
Wheatland.....	Frame steam-power elevator.....	50,000	100
Casselton.....	Frame steam-power elevator.....	50,000	60
Casselton.....	Frame warehouse, (adjoining,).....	20,000	80
Mapleton.....	Frame steam-power elevator.....	50,000	100
Mapleton.....	Frame warehouse, (adjoining,).....	10,000	50
Fargo .....	Frame warehouse.....	15,000	100
Fargo .....	Frame steam-power elevator.....	120,000	100
Glyndon .....	Frame steam-power elevator.....	60,000	100
Hawley.....	Frame warehouse.....	25,000	100
Lake Park.....	Frame warehouse.....	25,000	100
Audubon.....	Frame warehouse.....	15,000	100
Detroit.....	Frame warehouse, large.....	15,000	100
Detroit.....	Frame warehouse, small.....	5,000	100
Perham.....	Frame warehouse.....	15,000	100
Perham.....	Frame H. P. elevator "Wallace".....	20,000	100
Bluffton.....	Frame warehouse.....	5,000	100
Wadena.....	Frame warehouse, large.....	25,000	100
Wadena.....	Frame warehouse, small.....	5,000	100
Verndale.....	Frame warehouse.....	10,000	100
Aldrich.....	Frame warehouse.....	10,000	100
Motley.....	Frame warehouse.....	15,000	100
Belle Prairie....	Frame warehouse.....	10,000	100
Little Falls....	Frame warehouse, "J. C. Flynn & Co.".....	20,000	100
Royalton.....	Frame warehouse.....	10,000	100
Sauk Rapids.....	Frame warehouse.....	10,000	100
Blanchard.....	Frame warehouse.....	12,000	100

"It is stipulated that this insurance is limited in each building to amounts named in this schedule, under head of "Capacity in bushels," and this company, in the event of a loss, shall not be liable to contribute over one-tenth of the amount of all the insurance upon property described above.

"Loss, if any, payable to David Dows & Co., as interest may appear.

"This slip being attached to and becomes a part of Policy No. ....  
..... of ..... Agent."

To meet the demand of the grain business conducted by dealers owning and controlling numerous elevators, at which they purchase and from which they ship and distribute large quantities of grain, continually changing and shifting in the location and in the amount

of property to be protected, the insurance companies have adopted this form of policy, by which each company, while insuring a gross sum upon all grain in the elevators in its schedule, yet limits its liability in each elevator as certainly as though the amount allotted each were set opposite its name in the schedule.

It appears that on March 13, 1881, while the policy was in full force, the elevator at Mapleton was destroyed by fire, and the net loss on grain belonging to plaintiffs was \$12,986.18.

At the time this policy was procured the same agent insured the plaintiffs in other companies upon the property described in defendant's policy, and concurrent therewith, to the amount of \$20,000, which additional insurance was in force at the time of the loss; and at that time the plaintiffs also had insurance against loss or damage by fire to the amount of \$330,000 upon the grain contained in two elevators at Duluth, and the elevators and warehouses described in defendant's policy.

All the policies were written by filling out and inserting, in the company's ordinary policy, a printed blank slip or schedule, as above set forth, with the addition:

"Duluth steam-power elevator A; capacity, 100,000 bushels; detached."

"Duluth steam-power Lake Superior elevator; capacity, 100,000 bushels; detached."

The defendant's policy and two others for \$20,000, making, with defendant's risk, \$40,000, excepted, as appears in schedules, the elevators at Duluth.

Policies in other companies to the amount of \$330,000 covered the elevators in Duluth as well as those outside.

There was contained in the elevators at Duluth, at the time of the fire, plaintiffs' grain of the cash value of \$168,107.28, and in the elevators and warehouses mentioned in defendant's policy of the cash value of \$189,220.22.

The amount of defendant's liability is the only question at issue in the view taken by the court. To arrive at this it is necessary to ascertain what proportion of the \$330,000 insurance upon the grain, both in and outside of Duluth, was applicable to pay the loss at the date it occurred. The aggregate value of the grain at the time of the fire was \$357,327.50; of that outside of Duluth \$189,220.20; so that there would be 189,220.22-356,327.50 part of the \$330,000 insurance which could be applied at the time to loss outside of Duluth,—that is, \$174,749. If to this is added the \$40,000 taken by

the defendant and other companies upon grain outside of Duluth, it will give \$214,749—the total amount of insurance which must pay the loss. The proportion which defendant and the other companies having \$20,000 like insurance must bear is 40,000-214,749 of \$12,-986.18, equal to \$2,418.88, and the defendant company one-half of this sum, which is \$1,209.44.

Judgment will be entered for this amount, with interest and costs.

### *In re* GRAVES, Bankrupt.

(District Court, D. Delaware. 1881.)

#### 1. PAYMENT—EVIDENCE OF—DECLARATIONS OF CREDITORS.

A declaration previously made by petitioning creditors, who afterwards sought to have their claims proven before the register in bankruptcy, that such claims were paid on the supposition that they were entitled to a security or securities which gave them an unlawful preference under the bankrupt act, which preference was afterwards set aside as void by the court, is not sufficient of itself to sustain a plea of payment.

#### 2. LIMITATIONS—PROVING CLAIMS.

If a claim is not barred by the state statute of limitations before the adjudication of bankruptcy, the statute of limitations does not commence to run; and no lapse of time will prevent the proof of such claim before the register up to the final distribution of dividends. If it is barred by the statute before the adjudication it will remain barred, and the claim cannot be proven.

#### 3. UNLAWFUL PREFERENCES — DECREE AGAINST CREDITOR IN A SUIT AGAINST THE ASSIGNEE—SUBSEQUENT ATTEMPT TO PROVE THE CLAIM.

A decree upon a contested suit by a creditor against the assignee, deciding that the right sought to be established is an unlawful preference, and void under the act, prevents such a surrender under the act as will enable the creditor to prove the claim which was the consideration of such preference, and to come *pari passu* with other general creditors. They may surrender and prove before such a decree, but not afterwards, and when a knowledge of the same has been brought home to them.

In Bankruptcy. Upon petition of Henry C. Robinson, assignee of said bankrupt, to strike off certain claims of Swan, Clark & Co., proved before the register.

*Charles B. Love and J. Henry Hoffecker*, for assignee, cited—

Bankrupt act of March 2, 1867; *In re Lee*, 14 N. B. R. 89; *Tinker v. Van Dyke*, Id. 112; *Barnewall v. Jones*, Id. 278; *Oxford Iron Co. v. Stafler*, Id. 380; *Swan, Clark & Co. v. Robinson*, 5 FED. REP. 287; *Phelps v. Stephens*, 4 N. B. R. 34; *Vorkin v. Newartha*, Id. 52; *Rechter's Est.* Id. 221; *Scott v. McCarty*, Id. 414; *In re Kipp*, Id. 593; *In re Cramer*, 13 N. B. R. 225; *In re Riorden*, 14 N. B. R. 332; *In re Stein*, 16 N. B. R. 569; *In re Leland*, 9 N. B. R. 200; *In re Dakin*, 19 N. B. R. 181.

As to the bar of the statute of limitations: *In re Cornwall*, 6 N. B. R. 305; *Nicholas v. Murray*, 18 N. B. R. 469; *Capelle v. The Church*, 11 N. B. R. 536.

*William C. Spruance and Anthony Higgins*, for respondents, cited—

*Swan v. Robinson*, 5 FED. REP. 287; *In re Cramer*, 13 N. B. R. 225; *In re Riorden*, 14 N. B. R. 332; *Burr v. Hopkins*, 12 N. B. R. 211; *In re Davidson*, 3 N. B. R. 106; *In re Kipp*, 4 N. B. R. 190, (593;) *Scott v. McCarthy*, Id. 139, (414;) *Hood v. Karper*, 5 N. B. R. 358; *In re Stephens*, 6 N. B. R. 533; *In re Black*, 17 N. B. R. 399.

And as to the bar of the statute of limitations: *In re Knoepfel*, 1 N. B. R. 70; *Waples v. Magee*, 2 Harrington, 444; *Burton v. Waples*, 3 Harrington, 75; Bankrupt Act, § 19; section 5007, Rev. St.; *In re Eldridge*, 12 N. B. R. 540; *Ex parte Ross*, 2 Glynn & J. 46; *Minot v. Thatcher*, 7 Metc. 348; *Richardson v. Thomas*, 13 Gray, 381; *Collister v. Hailey*, Id. 517; Angell, Lim. § 167; Blumensteil, Bankruptcy, 240, § 5057; *Hanger v. Abbott*, 6 Wall. 532; *The Protector*, 9 Wall. 687; *U. S. v. Wiley*, 11 Wall. 508; *In re Eldridge*, 12 N. B. R. 540; *Peiper v. Harmer*, 5 N. B. R. 252; *Stewart v. Kan*, 11 Wall. 493; 2 Story, Eq. Jur. § 1531; *Pulteney v. Warren*, 6 Ves. 73, 91, 92; *East India Co. v. Campion*, 11 Bligh, 158, 187.

BRADFORD, D. J. The questions to be considered and decided arise upon a rule to show cause why certain claims of Swan, Clark & Co., of the city of Philadelphia, against the bankrupt, Thomas J. Graves, should not be disallowed and expunged from the list of unsecured debts proven before the register in bankruptcy. An answer has been put in to the petition and replications thereto, and issues joined. By an amendment, the statute of limitations has been pleaded. These claims consist of two promissory notes, and a book of account for moneys due and owing from the bankrupt to Swan, Clark & Co., and are as follows:

(1) \$846.78. WILMINGTON, DELAWARE, May 20, 1873.

Sixty days after date I promise to pay to the order of Swan, Clark & Co., at the First National Bank of Wilmington, \$846.78, without defalcation, for value received.

THOMAS J. GRAVES.

Indorsed: Swan, Clark & Co.

(2) \$300. WILMINGTON, DELAWARE, May 12, 1873.

Sixty days after date I promise to pay to the order of Swan, Clark & Co., at the First National Bank of Wilmington, \$300, without defalcation, for value received.

THOMAS J. GRAVES.

Indorsed: Swan, Clark & Co.

(3) A bill of goods sold by Swan, Clark & Co. to the bankrupt, amounting to \$222.40, the date of the last entry being June 26, 1873.

The objections to the proof of these claims are—

(1) Payment. (2) The statute of limitations. (3) The reception of a preference against the provisions of the act of congress which they have not surrendered to the assignee for the benefit of the general creditors.

We do not think this plea of payment has been sustained. The declarations to that effect by one of the partners of the firm of Swan, Clark & Co., on the supposition that they had made a valid purchase of certain loan stock, is not enough. Such a declaration must have been made on the supposition that the sale had been a valid one, and as such had paid and wiped out the debt due on the promissory notes and book account. Now, that sale was set aside as void by the circuit court. If Swan, Clark & Co. have any merits on other grounds, and desire to come in on these claims *pari passu* with the other general creditors, they should not be prohibited because of the fact that they were mistaken in the supposition that they had made a valid purchase which had satisfied these notes and the book account. The court decided that no value passed by the transfer of the loan stock to Swan, Clark & Co., therefore there could not have been any payment in this mode of the notes and book account. We think this plea has not been sustained.

The statute of limitations has been urged as a bar to the proof of these notes and book account before the register in bankruptcy. It will be seen that these notes and bill of goods sold were not barred by the statute of limitations at the time of the adjudication of bankruptcy, that having been made on the twenty-ninth day of September, 1873. If they were so barred at that time, it is admitted that the bar remains in force, and they cannot be proven; but if the bar has not already operated to prevent proof, does it run, or is it suspended by the bankruptcy and the appointment of the assignee?

On one side it is urged that the United States courts will follow the state law in applying the statutes of limitations as they are applied in the states when the United States courts sit, and as six years bars the proceeding on notes, and three years on book account, it is alleged by the petitioners that these claims should not be proven. On the other hand, it is nowhere said in the Revised Statutes that claims barred by the state laws shall not be proven before the register in bankruptcy; and such being the case we inquire whether, in the administration of the bankrupt laws, it is consistent with their intention to apply the state limitation laws?



The theory on which the limitation acts are based is the prevention of the collection of stale claims, and this is founded on the reasonable presumption that a man, if he had a valid claim, would proceed to recover it by suit; but on the legal principle of *causa cessante lex ipsa cessat* that rule cannot have application, where, by the provisions of the bankrupt act, the assignee cannot be sued by the creditors. The distribution of the bankrupt's estate is committed to him without vexatious interference by suits of creditors. No time is fixed by law within which they must present their claims for proof. We think, the result of the authorities is that if the bar of the statute is not complete before the adjudication of bankruptcy, it does not run afterwards; and as that was the case here, we are led to conclude that the statute of limitations of the state of Delaware does not present a bar to the proof of these claims. The most serious objection to the proof of these claims is based on the allegation that these creditors have held security for their payment, which they have not surrendered for the benefit of the general creditors. Now, it is undoubtedly true, to enable a secured creditor to prove his claim he must surrender his security, and all benefit and advantage arising therefrom, before he can prove his claim thus secured; and it is also true that if he contests his right to his security in the courts, and chooses to rely on it for the ultimate payment of his claim, and fails, he loses his right to prove his claim as an unsecured one, unless he does it before the entry of the judgment or decree of the court against him. I do not consider it necessary to repeat what has been said on another occasion on this subject, as the view I take of the law and the facts of this case make it unnecessary to do so.

This is an objection to the proof of this claim which appears to me to be insuperable: Swan, Clark & Co. did, without a doubt, hold a security for their claims, which they now wish to prove within the meaning of the bankrupt law. They held the paper or instrument which secured them. It was of such a character that it could have been assigned or transferred to the assignee of the bankrupt prior to the decree, but not after it. It is true that the right to the loan stock was coupled with conditions, but they did not impair the right in the owner to transfer the stock subject to such conditions, or its value in the hands of the assignee after it should have been transferred.

The act of congress makes it imperative on any creditor thus secured to give up his security to the assignee before he shall be permitted to prove his claim. He can elect to stand on one or the other,—

that is, he can rely on his security, or he can give it up and prove his claims as a general unsecured creditor,—and as he elects he must stand or fall. The original act of congress of March 2, 1867, applicable to this case, is in the following words, viz.:

“Any person who, after the approval of this act, shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend thereupon until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference.” Section 23.

Now, in point of fact, Swan, Clark & Co. did not make such surrender as was required by the act of congress, but appealed to the decision of the circuit court for this district as to their right to retain the same as their own property; and, as has already been said, the decree of that court was against them on this point. Any surrender, or attempted surrender, of the security after the decree of the court had been announced against them,—and such decree was within the knowledge of the respondents,—is not such a surrender as is contemplated by the act, and would not let in the respondents to prove their claims; and while some of the cases cited go very far in allowing parties to surrender their securities even after judgment or decree has been rendered in a contested suit, yet none of them go to the extent of allowing such a surrender after a decree made has come to the knowledge of the parties before an actual entry of such decree on the record. As long as there is doubt as to the decree or judgment there may be a *locus penitentiae*, but after that doubt is removed, and a knowledge of the decree or judgment is brought home to the parties, the opportunity of surrender is gone.

We think the result of the authorities cited is to establish the proposition that no surrender of the security upon which a preference has been sought to be obtained can be made after a recovery, so as to let in the respondent to the proof of his claim; at least, this is the result of the modern authorities, and appears to me to be more conformable to reason and the principles on which the bankrupt law is founded than the earlier conflicting decisions to the contrary. See particularly *In re Cramer*, 13 N. B. R. 225,—decision by Judge Nelson, in 1876, after the decree “the *locus penitentiae* had passed” the contesting party could not surrender. See also *In re Riorden*, 14 N. B. R. 335, by Judge Blatchford, in which, by inference, he holds

that the surrender was not good after recovery. See *In re Stein*, 16 N. B. R. 569; by Judge Blatchford, in which this proposition of inability to surrender the preference after recovery is maintained. Other cases might be cited to sustain this view of the case. The only modern authorities in conflict with them are *In re Black*, 17 N. B. R. 399, and *Burr v. Hopkins*, 12 N. B. R. 211.

From the evidence in this cause it appears that there is a conflict of testimony as to the fact of an offer to surrender the security creating the preference; but the respondents having retained this security, and having sought to establish their right to it by a suit in the circuit court of this district, it is manifest that in point of fact they never made such surrender up to the time of the announcement of the decision by the court; nor does it appear that such a surrender was ever made afterwards. For these reasons we deny the right to the respondents to prove their claim founded on the notes and book account, which was the consideration for the security, and we grant the prayer, etc., of the petitioner that the same shall be stricken off.

Considering that this is a case of constructive fraud only, we think it right that the whole costs should be equally divided between the petitioner and the respondent.

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PATTEE and others v. MOLINE PLOW Co. and others.

(Circuit Court, N. D. Illinois. June 22, 1881.)

1. LETTERS PATENT—CULTIVATORS—INFRINGEMENT.

The tongueless, straddle-row cultivator, which has an arched or bent axle, with wheels revolving upon the journals at the end of the axle, and plows attached to the axle by a joint allowing the plows to swing vertically and laterally, the axle being jointed in the middle of the arch by a torsion joint, which is prevented by lugs from turning only a certain distance, does not infringe patents issued, respectively, to Schroeder, Eichholtz, Norton, Pattee, and Poling.

2. COMBINATIONS OF OLD PARTS.

A patent for the combination of old parts is not infringed by a different combination of the same parts to produce the same result.

In Equity.

A. McCallum, for complainants.

West & Bond, for defendants.

BLODGETT, D. J. The bill in this case alleges the issue of the following patents by the United States patent-office:

(1) Patent issued to J. Schroeder, September 24, 1867; reissued to complainants, February 6, 1877. (2) Patent issued to M. Eichholtz, April 6, 1869; reissued to complainants, June 12, 1877. (3) Patent issued to C. P. Norton, October 18, 1870; reissued to I. P. Pillsbury, August 26, 1873. (4) Patent issued to James H. Pattee, March 5, 1872; reissued to complainants, October 6, 1874. (5) Patent issued to T. Poling, August 13, 1872.

—All of which patents were for improvements in cultivators, and have come by assignment into the ownership and control of the complainants.

It is further charged that the defendants, disregarding the exclusive right secured by the aforesaid patents to the complainants, have made and sold, within this district, cultivators according to and in which are embodied devices and inventions covered by the said patents, as the same now stand reissued. The bill contains the usual prayer for an injunction, and an accounting for profits and damages. The defendants, by their answer, deny the validity of the complainants' several patents—

*First*, for want of novelty; *second*, because the reissued patents are for different inventions than those shown by the original specifications and drawings; *third*, they deny that the cultivators made by them infringe all or any of the complainants' patents.

It appears from the proof, as part of the history of the patents in question, that James H. Pattee, one of the complainants, devised what he considered a valuable improvement in cultivators, involving what he deemed a radical innovation on the then mode of constructing this implement, which was to make a two-horse straddle-row cultivator without a tongue or pole—in other words, a tongueless cultivator. The Pattee model, which is in evidence, shows the general idea of his invention—a cultivator, with the ordinary device of an arched axle for straddling the rows of corn or other plants to be tilled; the axle, jointed near the horizontal arms which form the journals for the wheels, and supported on wheels, with the plow's beam hinged to the axle by joints which allow them to oscillate or swing vertically and laterally. For this device he obtained the patent of March 5, 1872, which was subsequently reissued on the sixth of October, 1874. After this patent was obtained the complainants procured assignments of the Schroeder, Eichholtz, and Norton patents,—all of which were cultivators, provided with tongues as an element of their organism,—and secured reissues thereof, covering certain features which are assumed to be essential to the tongueless

machine, and they have also obtained an assignment of the Poling patent, which is a few months later in date than the Pattee patent. What may be called the Pattee cultivator has two characteristic features—

(1) It operates without a tongue or pole, the draft animals being attached in such a way as that each animal, within certain limits, draws his own plow, the draft being distributed to each animal by means of the joints in the axle; (2) it has a jointed axle or coupling yoke, by which the two plows are held together and made to operate at a certain distance apart.

It seems, for the purposes of this case, to be conceded that, in order to make this class of cultivators practical, there must be some provision for the flexion of the axle, so that each horse shall move its own plow, or the plow to which it is directly attached, independently of the other, to a limited extent. That is, if the two plows are rigidly coupled or connected together, and one horse moves faster than the other, or deflects from the line of draft, the machine will have a sideways motion, which will throw it upon or too close to the rows of plants it is intended to cultivate, or require extra effort on the part of the plowman to keep it in line. A joint of some kind, then, which shall operate to prevent the sideways action spoken of, and also divide the draft between the horses, is deemed a special desideratum in this class of cultivators, and one of their chief merits. The flexion is obtained in complainants' machine, under the Pattee patent, by means of two joints, one at each end of the axle, A, as it is termed in the specification. The joints are made by means of the side plates, A and B, and a spindle, as shown. From these side plates stand the horizontal arms which form the journals for the supporting wheels; the plow-beams being attached to the axle just outside the joints—that is, between the joint and inner end of the hub. These joints allow a free backward and forward motion, and the combined parts make the arched jointed axle described.

The principal defendant in this case, the Moline Plow Company,—the other defendants being officers of the corporation, and only charged with violating these patents by their action as such officers,—makes a tongueless, straddle-row cultivator, which has an arched or bent axle, with wheels revolving upon the journals at the ends of the axle, and plows attached to the axle by a joint allowing the plows to swing vertically and laterally, and the axle jointed in the middle of the arch by a torsion joint, which is prevented by lugs from turning only a certain distance; but the joint is placed in the mid-

dle of the axle, instead of having two joints at the spring of the arch, as shown in the Pattee patent.

It is insisted, on the part of the complainants, that it is by the use of this jointed axle,—that is, the axle jointed in the middle,—and in the peculiar two-way joint by which the defendants' plow-beams are attached to the axle so as to secure the requisite lateral and vertical motion to the plows, that certain claims in all these patents owned by the complainants are infringed. In other words, the complainants insist that the defendants' joint in the middle of their axle is but the equivalent of the two side joints in the Pattee axle, and is the same joint which is shown in the Pattee, and at least anticipated in the devices of Schroeder, Eichholtz, and Norton. The Schroeder machine was a straddle-row cultivator with a frame, consisting of wheels, axle, and tongue, but with a peculiar device for securing the plows to the frame by means of what he terms an "arched beam-yoke," which was bolted or pivoted at its center to the tongue in such a manner as that "either end of said beam-yoke may be advanced or receded with its respective plow without disturbing the parallelism of the plow-beams," which are hinged or jointed to the yoke in such a manner as to permit of their being oscillated laterally or vertically, and yet to sustain the plows in their upright positions without rear connections. The plows are attached to this vibrating bar or "arched beam-yoke" by a two-way joint,—this two-way joint allowing a vertical and lateral motion to the plow,—and at the same time the joint is so constructed as to hold the plows in an upright position. The arched beam-yoke consists of the centrally vibrating beam, or evener, and the pendant side arms which drop from the end of the evenner. The joint by which the beams are attached to the pendant consists of two flat pieces of metal, one bolted to the top and the other to the under side of the end of the plow-beam, and bent so as to come together forward of the end of the beam. A bifurcated or split plate is made to pass on each side of the pendant, and is attached thereto by a bolt fastened through both parts of the split plate and the pendant, by which means the vertical movement of the joint is obtained. This split plate is carried back and flattened so as to pass between the two plates which embrace the end of the plow-beams, and attached thereto by a bolt, so as to secure the lateral movement. The plows are drawn by means of a forked or two-pronged draft-bar, one limb of which is attached to the lower end of the pendent part of the yoke, and the other either to the upper end of the pendant or to

the end of the evener, and the whiffletrees are attached to the forward end of these two bars, where they converge into a hook, or other device, for attaching them. The claims of this patent, as reissued, which the defendant is alleged to have infringed, are the first, second, third, and fifth, which are as follows:

"(1) Two plow-beams, B B, connected together by an elevated beam-yoke, A, so that either may operate in advance of the other, while both are drawn forward in the line of progression by draft animals attached to each side of the machine, so that each animal draws in a manner its adjacent plow, the attachment of the plow-beams to said yoke being by joints which permit the moving of the beams freely and independently in a lateral direction, combined and operating substantially as described, and for the purpose specified.

"(2) Two plow-beams, B B, connected together by an elevated beam-yoke, A, so that either may operate in advance of the other, while both are drawn forward in the line of progression by draft animals attached to either side of the machine, so that each animal draws in a manner its adjacent plow, the attachment of the plow-beams to said yoke being by joints which sustain the plows in an upright working position without rear connections or other support, and permit of their being moved or oscillated freely in a lateral direction, combined and operated substantially as described, and for the purposes specified.

"(3) Two plow-beams, B B, connected together by an elevated beam-yoke, A, so that either may operate in advance of the other, while both are drawn forward in the line of progression by draft animals attached to each side of the machine, so that each animal draws in a manner its adjacent plow, the attachment of the plow-beams to said yoke being by joints which sustain the plows in an upright working position without rear connections or other support, and permit of their being moved or oscillated freely in a lateral or vertical direction, combined and operating substantially as described, and for the purpose specified.

"(5) The draft-bars, F F, hinged to the beam-yoke, A, and combined to operate with said beam-yoke and plow-beams, B B, substantially as described, and for the purpose specified."

It will be seen that the first claim covers the two plow-beams, connected together by a beam-yoke, so arranged that one may operate in advance of the other, and the plow-beams being attached to the yoke by joints which permit each beam to move freely in a lateral direction, combined and operated substantially as described. In other words, as I understand and construe this claim, it is for a combination of these plow-beams; the particular and special kind of beam-yoke; and the joints by which the plow-beams are hinged to the yoke, so as to secure the lateral motion. The second claim is for precisely the same combination of parts, with the additional statement that the joints by which the plow-beams are attached to the yoke are to sup-

port the plows in an upright working position, and permit of their being oscillated in a lateral direction; while the third claim is for the same combination of parts, with the additional statement that the joints attaching the plow-beams to the yoke must permit the beams to be moved or oscillated freely in a lateral or vertical direction. The fifth claim is for the combination of draft-bars, connected with the beam-yoke and plow-beams as described.

By the first claim he covers as new the combination of certain parts as shown, and the joint allowing a lateral motion to the plows; and by the second and third claims he covers the other functions of the same joint; not the joint as such, on the assumption that no such joint was ever before made, but the result or operation of the joint. By the second claim, that the joint sustains the plows in an upright position; and in the third claim, that it allows the plow to move laterally or vertically. This joint, as shown in his mechanism, is simply a two-way joint, and when used in this combination, as described, permits all these movements or functions as a necessary part of its action in the mechanism, and also holds the plow in an upright position, and I cannot see how these claims for the result or functions of the joint can be deemed valid. It is the mechanism which is the subject-matter of the patent, and not the result of the mechanism.

The Eichholtz patent is for a tongued cultivator, parts of which are so arranged and combined as to dispense with wheels, and where each draft animal was attached to his own plow. It is not a tongueless cultivator, as will be seen, but consists of a beam-yoke, coupling the plow-beams together and to which the plow-beams are attached by a peculiar joint described, which allows the plows to be operated vertically and laterally; but they could not be dropped below a certain line by reason of the extension of the heel of the joint, as I call it, backwards from the pivot. The claims in this reissue patent, which are brought in question in this case, are:

"(1) The combination of two plow-beams and the beam-yoke, connected together by joint pieces so that the yoke sustains the beams in upright working position without their being connected together in rear, and is itself supported in an elevated position, the beams having also lateral and vertical motion, substantially as and for the purpose specified."

—Or, as I understand it, this claim is for a combination of this special kind of beam-yoke, so arranged as to support the plows in a vertical position upon the yoke.



"(2) Two plow-beams, B B', connected together by an elevated beam-yoke, A, so that either may operate in advance of the other while both are drawn forward in the line of progression, the attachment of the plow-beams to said yoke being by joints which sustain the plows in an upright working position without rear connections or other support, and permit of their being freely moved independently in a lateral direction, and in a limited vertical direction, permitting the necessary vertical movement of the plows and sustaining the beam-yoke in an elevated position, combined and operating substantially as and for the purpose specified."

It seems to me that the only material feature in this combination, which is not found in the Schroeder patent, is the peculiar joint by which the plow-beams are attached to the yoke so that the yoke sustains the plows in an upright position, and permits of a limited lateral and vertical motion of the beams. It may be remarked, and that is all I propose to say in reference to this joint, that it is but another form of a two-way joint. The pivot upon the yoke allows of a lateral motion to a limited extent; the peculiar joint by which the plow-beam is attached to the plate pivoted upon the yoke allows a limited motion upwards and downwards.

The machine covered by the Norton patent is a frame mounted on runners instead of wheels, and the frame is so jointed as to permit one plow to advance ahead of the other, and the plow-beams to be vertically and laterally oscillated by the peculiar mechanism shown. This sled, as it may be called, is arranged with cross-pieces, connected by runners and a tongue in such a manner as to produce the movements of an ordinary parallel rule, by means of which one plow may be drawn slightly ahead of the other, and the irregularities of the working of the team compensated for, to a certain extent, by the mechanism shown. The plow-beams are attached to one of the forward vibrating-bars, in connection with this parallel-rule motion, so as to allow of a limited lateral and vertical motion, but are held upright by a peculiar arrangement of the joints. The claim in this reissued patent is for—

"The main frame, A B, and runners, E, arranged relatively to each other so that either side of the main frame, together with its runner, may be advanced, and either plow-beam vertically or laterally oscillated without disturbing the parallelism of the runners with each other, or with the line of progression, substantially as described, and for the purposes specified."

It will be noticed that running all through these reissued claims is substantially the same idea—the same leading thought: That each plow is to be advanced in the line of progression without disturbing the parallelism of the beams, and without materially disturbing the

action of the other plow, within the limited scope of this allowable motion.

The peculiarity of the Pattee invention I have already sufficiently described.

The claims which it is insisted the defendant infringes are :

"(1) The combination in a walking straddle-row cultivator of the following instrumentalities, viz.: two wheels, D D, axle, A, and two plow-beams, K K, each beam carrying a handle and one or more shovels or plows, and independently hinged to the axle, so as to be retained in working position without rear connection or support, and moved freely in a lateral, vertical, and horizontal direction, substantially as and for the purposes specified.

"(4) The combination of the plow-beams, K K, axle, A, and wheels, D D, the latter being hinged or pivoted to the axle to permit of one side moving in advance of the other, substantially as described, and for the purposes specified."

The Poling patent describes a tongueless straddle-row cultivator, the forward ends of the plow-beams of which run upon caster wheels; and the plow-beams are held together by an arched or elevated beam-yoke, jointed in the middle. In the Poling patent the casters are attached to the axle, as he calls it, and the plow-beams are also attached to the axle by a joint in a way which admits of lateral motion only. They are rigidly attached, so far as any vertical motion independent of the yoke or axle is concerned, but the vertical motion of the plows is obtained by the joint in the axle. The plow-beams are attached to the yoke by a joint which permits of their free lateral movement, but the needful vertical motion is obtained by means of the joint in the middle of the yoke or axle.

I have thus described and discussed briefly each of the complainants' patents. The next inquiry is as to the novelty of those devices, and whether the defendant infringes the same.

From the proof in this case it is quite clear to me that Pattee was not the first to conceive and embody in a working machine the idea of a tongueless straddle-row cultivator. The first machine shown in the proof, which embodies this idea, is that patented by Isaac Constant, in November, 1851. It is a tongueless straddle-row cultivator, with all the elements for a working machine of that description, and so arranged as to be what may be called in this art self-sustaining; that is, it will stand upon its own supports. This was also done by Arnton Smith, in January, 1855; by Whiteley, in 1860 to 1865; by E. W. Vangundy, in February, 1864; by Pratt, in October, 1864; and by Adam Young, in November, 1866. All these show cultivators constructed without a tongue, with two plow-beams held together by

a yoke, each plow drawn by its own draft animal, and operating independently of the other.

The specifications in the patent of Arnton Smith show the idea which he intended to embody in his machine very clearly, as follows:

"Be it known that I, Arnton Smith, of the county of Macoupin and state of Illinois, have invented a new and useful improvement on the plow, and I do hereby declare that the following is a full, clear, and exact description of the construction and operation of the same, reference being had to the annexed drawings making a part of this specification.

"The nature of my improvements consist in so constructing them that they shall admit of a free and independent motion of each other by means of the hinged slide-rods, D, in combination with the bar, E, and the coupling-rod, F, said rod F answering the double purpose of a coupler and a double-tree, and thus dispense with the weight of a double-tree usually employed. \* \* \*

"Having thus connected the two plows together as before described, *and attached a horse to each plow*, I proceed to plow two furrows at a time. By placing them between two rows of corn I can plow next to each row and throw the dirt either up to, or away from, the corn; or I can place the two plows on each side of a row of corn and plow each side of the corn row, and throw the dirt away from the corn, or throw the same towards it, and thus hill up the corn. \* \* \*

"I do not claim any of the separate parts of my plow as new, and I am aware that two plows have been united somewhat like mine, but so that both must advance together, and one must, when raised alone, rotate upon and affect the other, whilst my separate plows may move freely."

He shows, in his plans, the two plow-beams held together by a coupling-rod, as he calls it, and to which the plows are jointed by swivel-joints. For the purpose of holding his plows in an upright position he has a rear connection, or shackle-bar, as it is termed in the complainants' device,—shackling the two plows together. Here, then, we have in Smith's device two plows jointed to a beam-yoke in such a manner as to allow of a lateral and vertical motion to each plow, independently of the other, and each animal draws his own plow. This is the first beam-yoke shown in the proofs in this case; but the disclaimer by Smith in his specification intimates certainly that other inventors or manufacturers had adopted the coupling-rod or beam-yoke prior to him. Nor was the idea of an arched beam-yoke new to Schroeder, who is the first and oldest of the complainants' patentees. An arched beam-yoke is shown in the Constant patent of 1851. This beam-yoke is arched so as to pass over the plants to be cultivated, and yet operates to hold the two plow-beams together. The same idea is also shown in the patents of Saville,

Vangundy, and Pratt, and the model of Whiteley. I read from the specifications of Vangundy's patent of 1864 this extract:

"The central portion of the front bar, D, (that is, the arched coupling-bar,) is bent upwards so as to pass over the tops of the rows of growing corn or other grain without injuring the crop, and the rear bar, E, is forked for the same purpose."

Nor was the idea of a jointed beam-yoke or axle which would allow one plow to advance to a limited extent without the other new to Schroeder, Eichholtz, Norton, Pattee, or Poling. Constant made provision for it by the pivoting of his beam-yoke to the beam, as shown in his model, thereby securing the even motion of Schroeder and Eichholtz, or parallel-rule motion of Norton and Pattee.

Vangundy made express provision for it in his specifications, as follows:

"As the retaining pins, *c c c c*, act as pivots, the longitudinal playing of the ends of the bar, D, upon the pins, *b b*, permit, to a certain degree, the independent movement of the two draught-beams in parallel lines, whilst a similar play of the ends of the bars E and F, upon their retaining pins, *c c*, within the slots in the share-beams, B B', permit the end of either draught-beam to be elevated or depressed independent of the other."

So that here is express provision for the independent action of each plow to a certain extent, and provision also for the lateral and vertical movement which is shown in the patents of the complainants.

Pratt says, in his specifications:

"The invention consists in connecting together two plow-beams, arranged in such a manner that each beam will have an independent movement, or one to a certain extent independent of the other, whereby the implement is placed more under the control of the operator than usual, and managed with less labor and with less fatigue to the team."

\* \* \* \* \*

"One draught animal is attached to each beam, A, and it will be seen from the above description that each beam, A, in consequence of being connected by the cross-bars, D D, as shown, is allowed a certain independent movement longitudinally, and may therefore be managed and operated with facility in case of meeting with obstructions, and the implement is not so liable to be strained or racked as when the rigid frames are used, nor the team so much fatigued."

"In plowing or cultivating corn I remove the bars, D D, and put on curved metal bars, H, as shown in figure 3."

Here we have, in the Pratt device, all of the substantial idea shown in Schroeder; that is, the connection of the plow-beams by a

beam-yoke so that they are held together, and the beam-yoke is arched so as to pass over the rows of plants, and each plow moves to a certain extent independently of the other, by means of the joints at the point where the yoke is attached to the plow-beams. Indeed, it seems to me that Schroeder's "arched beam-yoke" and Pattee's arched and jointed axle are fully anticipated in form of construction, function, and mode of operation by Pratt's "curved metal bar, H." And it is also noticeable that Pratt claims these characteristics as the patentable features of his devices, while they were not originally claimed (or at least allowed to them) by Schroeder, Eichholtz, Norton, or Pattee.

In 1865 W. S. Weir attached the plow-beams of his cultivator to an arched axle, as shown by the proofs, by a two-way joint, which held the plows in an upright working position without rear connections, and permitted all the lateral and vertical motions claimed in the Schroeder patent; while Adam Young, in November, 1866, and George E. Owens, in August, 1871, show the two plow-beams of a straddle-row cultivator connected together by an arched yoke with a joint in the middle, and for substantially the same purpose as used in Poling's device. Young says in his specifications:

"In order to arrange the connections between the plows so as to pass over the tops of corn leaves, after the latter have considerably advanced in growth, as is always the case with the late or final plowing, the connecting beams between the two plows are constructed in a peculiar manner by taking them in a vertical direction above each beam, and conducting them horizontally across towards the other plow. There are two of these bent beams attached to each beam, and to each other in the horizontal part of them, so as to form a pair. Each pair of these beams is coupled together by a peculiar clamp arrangement, which admits of a ready adjustment of the parts to accommodate the width of the rows as before recited. \* \* \*

"The sockets, *a*, are permitted to turn easily around their vertical axis so as to allow one of the plows to be drawn ahead of the other without wrenching or straining any of the parts, and the beams, *C C'*, are pivoted to the sockets, *a*, or the handle, *B'*, so as to allow the requisite lateral motion of these parts."

Owens, in 1871, describes a tongueless straddle-row cultivator with an arched beam-yoke jointed in the center by a ring, and he says that this arrangement permits one section or division of the implement to be eight to twelve inches in advance of the other. There is then shown, by the proof in this case, that at times long antedating all of the complainants' patents all of the ideas or peculiarities of the complainants' several machines—the arched yoke of Schroeder

and Eichholtz and the two-way joints—were adopted and are older than the date of either the Schroeder or Eichholtz patents. The idea of the jointed axle of Pattee, by which the rigidity of the cultivator frame is avoided, and each draught animal operates his own plow to a certain extent independent of the other, is older in the art than either of the inventions covered by the complainants' patents. Not that, in either of these preceding machines, there is shown just the same kind of joint, structurally considered, as that shown in the Pattee patent, or an arched beam-yoke precisely like that of Schroeder; but the idea and function of Pattee's axle and Schroeder's beam-yoke seem to have been anticipated and worked out, in practical machines, by the several inventors from whose specifications I have so fully quoted.

I, perhaps, should not leave this branch of the case without referring to the evidence touching the Whiteley cultivator, which appears in this record. This cultivator—a model of which is introduced in evidence—was never patented, but the proof shows that it was constructed and in use in the vicinity of Springfield, Ohio, from 1860 or 1861 up to 1873 or 1874, and the evidence shows that some hundreds of them were constructed and put to use in that locality, and that it was a popular and useful machine. It is true there is some dispute in the record as to the precise time in which Whiteley completed and manufactured his machines; but I think the clear preponderance is in favor of the defendants' assumption that these machines were made as early as 1860, and that Whiteley continued the manufacture of them for several years thereafter. This Whiteley machine certainly embodies the main ideas that are developed—perhaps with more mechanical skill, but not inventive genius—in the later devices of Pattee and Poling. The time when the Whiteley machines were first made and introduced is fixed by the testimony of the witnesses as during the war, and it is hardly possible that a person could be mistaken as to a fact which occurred during a historical period of such impressive interest as our late civil war.

Arched and jointed beam-yokes, then, being old, and two-way joints being old, the complainants' inventors could have patents only for their special devices and combinations. These patents may be valid as shown. That is, the Schroeder patent may be a valid patent for the combination of the peculiar parts which Schroeder shows in his patent and claims as his peculiar invention—his peculiar arched beam-yoke or evenner, his peculiar joint by which he sustains the plow, may be valid, and the combination of them, to make such

a mechanism as he shows, may be valid. He does not claim, in fact, to have invented a beam-yoke, nor a two-way joint; he does not assert that he is the first to have made a joint of this character, but simply puts it into his combination. So, too, an arched beam-yoke, jointed in the middle, as shown in Poling's patent, must be confined to his special joint; and this was evidently the view of the commissioner of patents. Poling describes his device,—his arched axle,—and then is allowed one claim, as follows:

"Having thus described my invention, I claim as new, and desire to secure by letters patent, the bars, A, constructed substantially as herein shown and described, and pivoted to each other at their inner ends, to adapt them to receive the plow-beams and draft, as and for the purpose set forth."

He describes the peculiar kind of axle. He describes how he secures the peculiar kind of joints shown—by cutting the axle in two and pivoting the parts together. It is true this is a torsion joint, the same as is used by the defendant, but it is a peculiar kind of torsion joint; and inasmuch as torsion joints were not new, and the idea of a joint in the middle of the axle had been shown by Owens, I think Poling must be limited to his peculiar joint. He cannot claim the idea of a joint in the middle of the arch or axle, because that had been done by preceding inventors.

The defendant's arched yoke is a peculiar device by itself. It is an arched axle with a hinge in the center. It differs not essentially, perhaps, in its mode of operation, from Poling's, but it has another kind of joint—a different joint from Poling's; not but what it has the same function, but Poling had no right, in the state of the art, to cover the function, or to cover every joint at that place. He was not the first to joint the arch or axle of a cultivator in the middle for the purpose of obtaining the result which he obtained. The field was open to the defendant to make another kind of joint in the same place which might accomplish the same result as Poling's without infringement. I therefore come to the conclusion that the defendant, in its combination of parts to produce its cultivator, does not infringe upon any of the special devices which are shown and covered by the complainants' patents. It is true that the defendant has an arched axle, but arched axles were old, older than Schroeder's or any of the complainants' patents. It is true that defendant's axle is jointed in the center, but an arched axle or beam-yoke, jointed in the center, was older than Poling's. It is true that defendant uses a two-way joint by which lateral and vertical motion of the plow-beam is

secured, and the plow is held in an upright position, but this had been done by Weir and other inventors long before any of the complainants' patents were issued.

The patents of Schroeder, Eichholtz, Norton, Pattee, and Poling all seem to me, from the proof, to be mere combinations of old parts, and, as I have said, may be valid as such combinations; but the defendant had the same right to combine other, or the same parts, so long as it did not use the same combination shown in complainants' patents, which I find it does not.

The bill is dismissed for want of equity.

### THE TUBAL CAIN.

(District Court, S. D. New York. November 17, 1881.)

#### 1 RES ADJUDICATA—STATE COURTS—ESTOPPEL—SUPPLEMENTAL ANSWER—ADMIRALTY—EVIDENCE—STAY OF PROCEEDINGS.

Where the substantial issue in two actions is the same, although the particular claims or causes of action be different, a trial and judgment upon the merits in the one action may be pleaded or given in evidence as an estoppel upon the same matter in the other.

The rule is the same, though the one action be in admiralty and the other in a state court or a foreign jurisdiction.

Where the owners of the brig T. C. chartered her to W. & Co. to proceed to Turk's island for a cargo of salt, to be furnished with quick dispatch, and the brig went there, and, after waiting eight days for a cargo, and none being furnished, returned to New York, refusing to wait longer or to go elsewhere for a cargo, as desired by W. & Co.; and the owners thereupon sued the charterers in a state court for breach of the contract in not furnishing the cargo as agreed, and the charterers then sued the owners by libel in this court for breach of the contract in not waiting longer or going elsewhere for a cargo as desired, and the defendants in each case set up a breach of the charter-party by the opposite side: *held*, that the substantial issue in each action was the same, and that a judgment in favor of the plaintiffs, after a trial by jury in the state court, might be set up as an estoppel in favor of the defendants in the action pending in this court; that leave should be given to set up the recovery of such judgment by supplemental answer; and, as there was an appeal pending from the judgment in the state court, the cause, on being reached for trial in this court, should be stayed until the determination of the appeal.

In Admiralty.

*Beebe, Wilcox & Hobbs*, for libellants.

*Hill, Wing & Shoudy*, for respondents.

Brown, D. J. A motion is made for leave to file a supplemental answer setting up a judgment recently recovered in a state court, in another action between the same parties.



On July 11, 1879, the respondents, who are owners of the brig Tubal Cain, chartered her to the libellants for a voyage from Turk's island to New York, to carry a cargo of salt, in bulk, at the price of seven cents per bushel, and the libellants contracted to furnish such cargo with quick dispatch on her readiness to receive it, and to pay at the rate of \$40 per day for any detention of the vessel through their fault. The Tubal Cain proceeded to Turk's island pursuant to the terms of the charter-party, and arrived there on September 8, 1879, but no cargo could be at once procured. After waiting until the sixteenth of September, and failing to obtain any cargo, she returned to New York. Before leaving Turk's island her master was requested to go to Inagua, where it was stated that salt could be procured, but he declined to do so.

On the sixteenth of October the owners, the respondents, commenced an action in the supreme court of this state to recover \$1,358.84, their damages against the present libellants for an alleged breach of the charter-party, in not furnishing a cargo of salt as agreed. The libellants appeared in that action on October 18th, and upon the same day filed their libel in this court to recover \$1,000 for their damages against these respondents for their alleged breach of the charter-party in not "waiting a reasonable time at Turks island, or procuring a cargo, or going to Inagua for a cargo, as requested."

The respondents in their answer, as a defence in this cause, set up the same breach of the charter-party by the libellants which they alleged in their complaint in the state court, and also pleaded in abatement the pendency of the suit in that court. On December 27, 1879, the libellants, as defendants in the suit in the state court, put in their answer, alleging that the master of the Tubal Cain, though requested, "refused to await a reasonable and customary time for the said cargo, or to procure a cargo of salt, or to proceed to Inagua," by which it was alleged that the owners were "guilty of a breach of the terms of the charter-party, and not entitled to the compensation named."

In May, 1881, a trial of the suit in the state court was had before the court and a jury, and a verdict rendered for the owners for \$970.41 damages, for which sum and costs judgment was duly entered in their favor on May 28, 1881. The respondents now ask leave to set up by supplemental answer the recovery of this judgment as a bar to the further prosecution of this action.

It is admitted that an appeal from this judgment has been taken, and is still pending.

This motion is made upon the call of the cause on the day calendar; and, along with the proposed supplemental answer, a duly-authenticated copy of the judgment roll in the other suit is also presented to the court, and a decision requested upon the merits of the proposed plea as a virtual disposition of this case.

From the facts above stated it is apparent that the claims of the respective parties upon the pleadings in the two suits are mutually exclusive of each other. The claim of each party in the two actions is based solely upon an alleged entire breach of the charter-party by the other, and an entire failure in its performance. Neither party could be defeated in either action except upon proof of facts showing

such a breach of contract on its part as must legally preclude it from any recovery in the other action. The sole ultimate question in each case is, which party was in fault for the vessel's return without a cargo? Thus, although the causes of action in the two suits are different, the fundamental question at issue in both is the same. In each suit each party alleges the other to be in fault in the same identical particulars which he sets up in the other suit; and in each the breach of contract alleged is not a partial breach merely, from which some incidental claim arises, but an entire failure of performance, such as necessarily excludes whichever party is guilty of such a failure from all claim under the contract.

The claim for damages which the libellants present by this suit might have been made in the action in the state court, under sections 500-502 of the New York Code, as a "counter-claim" growing out of the same transaction, without any substantial change in the answer which they actually interpose in that action. They did not make any such counter-claim for damages in that action, but they set up, as a defence to the plaintiff's demand, the same identical matters upon which their present claim is founded. The issues, therefore, in both actions are substantially the same. The issue has been tried upon the merits in the action in the state court, a verdict recorded thereon in favor of the respondents, and a judgment entered upon the verdict. It is not claimed that that issue, and all the matters involved in it, were not fully and fairly presented and tried in that action. Such a judgment properly pleaded is, by all the authorities, held to be an estoppel against all further controversy in any other action between the same parties upon the same subject-matter, whether the particular cause of action be the same or not.

"A fact which has been directly tried and decided by a court of competent jurisdiction cannot be again contested between the same parties in the same or any other court." *Hopkins v. Lee*, 6 Wheat. 109.

Its operation is not as a former judgment recovered upon the same cause of action, for the cause of action is not the same; but as an estoppel of record by an adjudication of the same identical matter once heard and determined between the parties. *Russell v. Place*, 94 U. S. 606; *Beloit v. Morgan*, 7 Wall. 619; *Aurora City v. West*, Id. 82; *Gardner v. Buckbee*, 3 Cow. 120; *Bouchard v. Dias*, 1 Coms. 71; *Hopkins v. Lee*, 6 Wheat. 109; *Bigelow, Estoppel*, (2d Ed.) 36, 45; *Flanagin v. Thompson*, 9 FED. REP. 177.

This case does not present the question which has given rise to conflicting decisions in the different state courts, viz., whether the

same estoppel should be held to apply where the same claim or defence was legally involved in the prior action, and might have been presented, but was not, in fact, presented or considered. In such cases the courts of this state hold that if such matter be available in the former suit, and the issue by its nature involves the whole transaction, the defeated party is equally bound, whether he avails himself of it or not. *Dunham v. Bower*, 77 N. Y. 76; *Schwinger v. Raymond*, 83 N. Y. 192. Other cases hold that where the causes of action are not the same, though growing out of the same transaction, the estoppel applies only to such issues as were actually raised and controverted, or to those ultimate facts upon which the verdict and judgment were predicated; and such has recently been the decision of the United States supreme court. *Cromwell v. County of Sac*, 94 U. S. 351; *Davis v. Brown*, 94 U. S. 423; *Smith v. Town of Ontario*, 4 FED. REP. 386; *Flanagin v. Thompson*, 9 FED. REP. 177; *Beseque v. Beyers*, (Wis.) Chic. Leg. N. Nov. 5, 1881, p. 60.

But here the substantial issue is the same in both cases. Each party urges the same identical facts in his own favor in both actions,—in the one action as a ground of claim for damages; in the other action as a defence against the claim of the other party. In such cases there is no conflict in the decisions. In the last of the above cases, cited by the libellants' counsel, the effect of the judgment as an estoppel in such a case is conceded. If the judgment had, therefore, been recovered prior to the filing of the libel and pleaded as a defence, it would, when proved, have been conclusive as an estoppel against the libellant's claim in this case. It does not matter that the former judgment was recovered in a different jurisdiction,—a sister state, or even in a foreign country; and a judgment of a state court is binding upon subsequent proceedings in admiralty in reference to the same subject-matter. *Goodrich v. The City*, 5 Wall. 566; *Taylor v. The Royal Saxon*, 1 Wall. Jr. 333.

In the answer here the plea in abatement of the other suit pending was of no avail, as that suit was in a foreign jurisdiction. *Wadleigh v. Veazie*, 3 Sumn. 165; *Loring v. Marsh*, 2 Cliff. 322; *Mitchell v. Bunch*, 2 Paige, 606; *Salmon v. Wootton*, 9 Dana, 422. But in such cases, whichever first ripens into judgment becomes effective, and may be then allowed to be set up as against the further prosecution of the other action. *Child v. Eureka Co.* 45 N. H. 547. The proper mode of doing this is by supplemental answer or plea *puis darrein continuance*. Steph. Pl. 611; *Hendricks v. Decker*, 35 Barb. (N. Y.)

298; *Butler v. Suffolk Glass Co.* 126 Mass. 512; *Drought v. Curtiss*, 8 How. (N. Y.) 56.

As there is no claim that the trial in the state court was not a full and fair trial, leave to file the supplemental answer should be granted, and the judgment roll, when offered in evidence, would be a bar to the further prosecution of the libellants' claim. Even if not pleaded, this judgment, as an adjudication against the libellants upon the same breaches of contract alleged by them in their libel, would be competent, if not conclusive, evidence against them on the trial. *Hopkins v. Lee*, 6 Wheat. 109; *Young v. Rummoll*, 2 Hill, (N. Y.) 478; S. C. 5 Hill, (N. Y.) 61.

As the judgment in the state court may be reversed on the appeal pending, the libel should not be dismissed, but the proceedings stayed until the determination of the appeal.

#### NOTE.

##### Conclusiveness of Judgments in Personam.

**GENERAL RULE.** An adjudication upon the merits of a demand by a court of competent jurisdiction is conclusive against the parties and those in privity with them before every other court, both of the cause of action and of every fact which is a necessary part of that cause of action; and, with regard to the facts going to make up the cause of action, the adjudication is conclusive not only in a subsequent suit upon the same cause of action, but in any suit that may be instituted between the same parties or their privies.(a)

**JUDGMENT MUST HAVE BEEN FINAL.** In order to bar a new suit upon the same cause of action the judgment must have been final(b) in the sense of being capable of being made the subject of an appeal. No interlocutory judgment or decision upon a motion not going to the merits of the action will bar another suit upon the same demand.(c) The New York Code has, however, somewhat enlarged the effect of interlocutory judgments.(d)

**ON THE MERITS.** The judgment, further, must have been rendered on the merits to bar a new suit upon the same cause of action. Judgment upon a plea in abatement, or upon a plea to the jurisdiction, or because the suit is

(a) *Balkum v. Satcher*, 51 Ala. 81; *Kelly v. Donlin*, 70 Ill. 378; *State v. Ramsburg*, 43 Md. 325; *De Proux v. Sargent*, 70 Me. 266; *Adams v. Cameron*, 40 Mich. 506; *Tilson v. Davis*, 32 Gratt. 92; *Western M. & M. Co. v. Virginia Coal Co.* 10 W. Va. 250; *Hendrickson v. Norcross*, 4 C. E. Green, 417; *Baldwin v. McCrae*, 38 Ga. 650; *Tioga R. Co. v. Blossburg & O. R. Co.* 20 Wall. 137; *Aurora City v. West*, 7 Wall. 82; *Beloit v. Morgan*, Id. 619; *Goodrich v. The City*, 5 Wall. 566; *Doyle v. Reilly*, 18 Iowa, 108; *Painter v. Hogue*, 43 Iowa, 426; *Allie v. Schmitz*, 17 Wis. 163; *Hath v. Frackleton*, 20 Wis. 320; *Smith v. Way*, 9 Allen, 472; *Jordan v. Faircloth*, 34 Ga. 47; *Demarest v. Darg*, 32 N. Y. 281; *Elmer v. Richards*, 25 Ill. 289; *Babcock v. Camp*, 12 Ohio St. 11; *Bell v. McCulloch*, 31 Ohio St. 397; *Sergeant v. Ewing*, 36 Pa. St. 156; *Cabot v. Washington*, 41 Vt. 163; *Garwood v. Garwood*, 23 Cal. 511; *French v. Howard*, 14 Ind. 465; *Shuttlesworth v. Hughey*, 9 Rich. 337; *Stewart v. Dent*, 24 Mo. 111; *Walker v. Mitchell*, 18 B. Mon. 511.

(b) *Webb v. Buckelew*, 82 N. Y. 555.

(c) *Id.*; *Collins v. Jennings*, 42 Iowa, 447.

(d) *Webb v. Buckelew*, *supra*; *Easton v. Pickersgill*, 75 N. Y. 599; *Riggs v. Purcell*, 74 N. Y. 370; *Dwight v. St. John*, 25 N. Y. 293.

premature, or upon any other matter not touching the merits of the plaintiff's demand, can only be conclusive for its own purpose; it cannot bar another action.(e) The judgment will, as has just been intimated, be conclusive of the point decided in it, and that, too, not only in another action upon the same demand, but in any other action which may afterwards be brought between the parties or their privies; but that is the extent of its conclusiveness.

VOIDABLE JUDGMENTS. Again, the judgment must have been valid.(f) If void, it can have no effect.(g) However, it matters not that it is merely voidable as for error of law(h) or of fact. A voidable judgment is as binding in collateral actions as one free from error.

PARTIES AND PRIVIES. On the other hand, judgments *in personam* conclude only the actual parties to the litigation, and those who claim under them.(i) By parties are to be understood all who have a right to control the proceedings, to make defence, to produce and to cross-examine witnesses, and to appeal.(j) This will include not only the parties whose names appear in the writ, but all persons who, being liable over to reimburse the defendant, are duly notified by him to appear and defend the suit.(k) It has sometimes been thought, also, that witnesses who appear in the cause and fail to set up any rights which they may have in the event of the suit or in the subject of it will be bound by the judgment;(l) but the better opinion is opposed to this position.(m) Besides, to be a party, one must act openly as such. To secretly employ counsel and to appear as a witness will not give one the *rights* of a party at all events.(n) In certain exceptional cases judgments *in personam* conclude strangers.(o) The effect of a judgment against married women and infants has been the subject of much conflict of authority. We cite some of the cases.(p)

WHAT JUDGMENT ESTABLISHES. Further, a judgment is conclusive, not only of the facts expressly decided by it, so far as they are material, but also of all facts and inferences necessary to it.(q) But this is the extent of its conclusiveness. It is conclusive only of facts without the existence and proof of

(e) *Phelps v. Harris*, 101 U. S. 370; *Clark v. Young*, 1 Cranch, 181; *Birch v. Funk*, 2 Mete. (Ky.) 544; *Stevens v. Dunbar*, 1 Blackf. 56; *Griffin v. Seymour*, 15 Iowa, 30.

(f) *Wizom v. Stephens*, 17 Mich. 518; *Queen v. Hutchins*, 6 Q. B. D. 300; S. C. 5 Q. B. D. 353.

(g) *Id.*

(h) *Lawrence v. Milwaukee*, 45 Wis. 306; *Case v. Beauregard*, 101 U. S. 688.

(i) *Springport v. Teutonia Bank*, 75 N. Y. 397; *Raymond v. Richmond*, 78 N. Y. 351; *Goodman v. Niblack*, 102 U. S. 556, 562; *Davis Machine Co. v. Barnard*, 43 Mich. 379; *McDonald v. Gregory*, 41 Iowa, 513; *Hine v. K. & D. M. R. Co.* 42 Iowa, 636.

(j) 1 Greenl. Ev. § 535.

(k) *Saveland v. Green*, 36 Wis. 612; *Valentine v. Mahoney*, 37 Cal. 339; *Altshul v. Polack*, 55 Cal. 633; *Carr v. United States*, 98 U. S. 433.

(l) *Barney v. Dewey*, 13 Johns. 224.

(m) *Yorke v. Steele*, 50 Barb. 397; *Wright v. Andrews*, 130 Mass. 149; *Blackwood v. Brown*, 32 Mich. 104; *Schroeder v. Lahrman*, 26 Minn. 57.

(n) *Schroeder v. Lahrman*, *supra*.

(o) See Bigelow, Estoppel, 101-103, (3d Ed.)

(p) *Id.* 61-63. Concerning married women: *Griffith v. Clarke*, 18 Md. 457; *Morse v. Toppan*, 3 Gray, 411; *Burk v. Hull*, 55 Ind. 419; *Hartman v. Osborn*, 54 Pa. St. 120; *Graham v. Long*, 65 Pa. St. 383; *Van Metre v. Wolf*, 27 Iowa, 341; *Gambetta v. Brock*, 41 Cal. 78. Concerning infants: *Waring v. Reynolds*, 3 B. Mon. 59; *Blake v. Douglass*, 27 Ind. 416; *Marshall v. Fisher*, 1 Jones, 111; *Whitney v. Perter*, 23 Ill. 445.

(q) *School Trustees v. Stocker*, 42 N. J. 115; *Tuska v. O'Brien*, 68 N. Y. 446.

which the decision could not have been rendered.<sup>(r)</sup> When it is said, as it often has been said, that a judgment is conclusive, not only of everything necessary to it, but also of everything that *might* have been litigated, it is clear that this can be true only so far as it relates to particular issues actually joined or necessarily implied. Even in New York, where the courts have gone to a great extreme in applying the rule of necessary facts, it is held that a judgment will not bar a counter-right of action of an independent nature.<sup>(s)</sup> The real difficulty is in regard to the meaning of "necessary facts;" but the weight of authority appears to be that facts which constitute a counter-right of action cannot be deemed to be barred by judgment for the plaintiff, unless the defendant put them in issue in the first suit; and this, though they are connected with the same subject-matter as that upon which the first suit was brought.<sup>(t)</sup>

MELVILLE M. BIGELOW.

*Boston, January 13, 1882.*

## THE ANCHORIA.

*(District Court, S. D. New York. January 6, 1882.)*

### 1. LIBEL—EXCEPTIONS—INSURERS—COLLISION.

The libellant may sue for himself and for the use of another where both are entitled to recover upon the same state of facts and the interest of the latter has arisen from subrogation to part of the right of the former.

Where goods are injured by collision at sea, and the insurers pay part of the loss, the owner of the goods may file a libel for his own loss unpaid, and for the use of the insurers to the extent of the loss paid by them. The libellant's authority to represent the insurers must appear to entitle him to recover for their use; but this will not be considered, upon an exception to the general want of power, to maintain a libel for the use of another.

Upon exceptions, *held*, that the libel, for the purpose of a sufficient identification of the goods, must state at least the description of them given by the bills of lading, and the date thereof, and also the essential elements of the contract of insurance upon which the rights and liabilities of the parties may depend.

In Admiralty. Exceptions to libel.

*Butler, Stillman & Hubbard*, for libellant.

*Jas. K. Hill and Wing & Shoudy*, for claimants.

<sup>(r)</sup>*Leonard v. Whitney*, 109 Mass. 265, 268; *Crofton v. Cincinnati*, 26 Ohio St. 571; *Dunham v. Bower*, 77 N. Y. 76; *Woodgate v. Fleet*, 44 N. Y. 1; *Hardy v. Mills*, 35 Wis. 141; *Hamner v. Pounds*, 57 Ala. 348; *Bradley v. Briggs*, 55 Ga. 354; *Supples v. Cannon*, 44 Conn. 424; Bigelow, Estoppel, 103, (3d Ed.)

<sup>(s)</sup>*Brown v. Gallandet*, 80 N. Y. 413.

<sup>(t)</sup>See *Bodurtha v. Phelon*, 13 Gray, 413; *Bascom v. Manning*, 52 N. H. 132; *Sykes v. Bonner*, Cin. Sup. Ct. Rep. 464; *Mondel v. Steel*, 8 Mees. & W. 838; *Davis v. Hedges*, L. R. 6 Q. B. 687; *Barker v. Cleveland*, 19 Mich. 230. The New York cases *contra* are *Gates v. Preston*, 41 N. Y. 113; *White v. Merritt*, 7 N. Y. 352; *Davis v. Tallot*, 12 N. Y. 184; *Dunham v. Bower*, 77 N. Y. 76; *Blair v. Bartlett*, 75 N. Y. 150; *Bellinger v. Craigue*, 31 Barb. 534; *Collins v. Bennett*, 46 N. Y. 490. See *Schwinger v. Raymond*, 83 N. Y. 193. The subject is further considered in the writer's work on Estoppel, pp. 118-129.

BROWN, D. J. The libel in this case was filed by Thomas C. Campbell, "for himself and for the use and benefit of the Ulster Marine Insurance Company, (limited,) his insurers," against the steamers *Anchoria* and the *Queen*. The libel sets forth a collision in mid-ocean between the two steamers on June 13, 1880, whereby goods of the libellant on board of the *Anchoria* were injured or destroyed to the extent of about \$5,000, and that the goods were partially insured by the Ulster Marine Insurance Company, (limited,) which had paid to him on account of the insurance the sum of \$2,576.18. The libellant seeks to recover the whole amount of damage to the goods, for the use of the insurance company to the extent of the amount paid by it, and the residue of the damage for the benefit of the libellant himself. The first exception to the libel is that the libellant, Campbell, is not entitled to maintain this action and recover for the use and benefit of the insurance company as claimed.

It is not denied that all persons entitled on the same state of facts to participate in the same relief may join as libellants, (Ben. Adm. Pr. § 380,) but it is claimed that in this case the insurance company is not joined as libellant, and that the practice is not allowed of one person suing for the use of another. The claims here represented, it will be observed, grow out of the same transaction, and the rights of the insurance company arise by subrogation to a part of the rights of the libellant. This objection now made seems to be answered by the decision in the case of *Fretz v. Bull*, 12 How. 466. In that case a flat-boat belonging to Bull & Co., the libellants, had been lost by a collision, as well as goods of the libellants loaded upon it. An insurance company had paid to Bull & Co. the whole value of the goods, but the boat was not insured. The libellants thereupon brought their libel precisely in the form of the libel in this case, to recover for themselves the value of the boat, and, for the use of the insurance company, the value of the goods. The same objection now urged was taken; and the court, *Wayne, J.*, held that "the parties named in the libel have respectively an interest, which is covered by the principle just stated, that the same state of facts which will give relief to one will permit others to be joined as libellants. It is no substantial objection," then, say the court, "that the suit has been brought in the name of Bull & Co. for the use of the Firemen's Insurance Company." *The Monticello v. Mollison*, 17 How. 152, 155; *Garrison v. Memphis Ins. Co.* 19 How. 312; *Hall v. Railroad Cos.* 13 Wall. 367.

The verification of the libel made by the attorney states that his information is derived in part from the representatives of the insur-

ance company; and it may, therefore, be perhaps inferred that this suit, in so far as it respects the interests of the insurance company, is prosecuted with their concurrence and by their authority. In the case of *Fretz v. Bull* that fact appeared in the proofs. The libel does not in this case directly state any request or authority from the company for prosecuting this suit in their behalf or for their use. Such an authority should appear in the proofs to entitle to a recovery upon this part of the claim, as otherwise the insurance company would not be bound by the proceedings or by the judgment rendered. No exception, however, was taken on this ground. The exception is to the general want of power in the libellant to sue in this manner, and that exception, upon the authorities above cited, must be overruled.

The nature of the alleged cause of action sufficiently appears by the allegations in the libel. The third and fourth exceptions are that the libel does not set forth with sufficient certainty the agreement of shipment or the consideration for it, and neither the terms nor a copy of the bill of lading; and it is claimed that the description of the goods is not sufficient to enable the Anchoria to identify them. The libel refers to bills of lading, but it does not give either their dates or the description of the goods as stated in the bills of lading. These should be supplied, together with the names of the consignees. The claimants are also entitled to a statement of what goods were "wholly lost," and what were only damaged; and also of the material parts of the contract of the policy of insurance upon which any rights of the parties may depend, including the time and place of the insurance, the persons insured, and their interest in the goods, as claimed by the fifth and sixth exceptions.

To this extent the exceptions are sustained; otherwise, overruled.

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#### THE ISAAC BELL.

(District Court, S. D. New York. December 22, 1881.)

##### 1. COLLISION—ANCHOR LIGHT—RIVER NAVIGATION.

Vessels at anchor at night in the vicinity of the navigable part of a river are bound to maintain an anchor light.

The schooner G. S. R. anchored at sun-down in the James river, near the White Shoal light. The river is there about four miles wide. The White Shoal is in the middle of the river. The usual channel, with from 26 to 16 feet of water, is about half a mile in breadth along the southerly side of the shoal. The place of anchorage was claimed to be outside of the channel, in about 15 feet of water only; but the various estimates of distance from the light and com-



pass bearings therefrom would bring the schooner more in the channel. The A., another schooner, anchored nearly abreast of the G. S. R., but one or two hundred yards nearer to the southerly shore. The steamer N., coming down the river at 11 P. M., passed about 50 yards to the north of the schooner G. S. R., on which no light was seen, the light of the schooner A. being visible. The night was cloudy and dark, but not thick. At 2 A. M. the steamer I. B., whose usual course is a little to the southerly of the N.'s course, came down the river, having the A.'s light a little on her starboard bow. When near her, the I. B. veered to port to avoid the A., and in doing so immediately ran upon the schooner G. S. R., no light being seen upon the latter. No anchor watch was kept upon either schooner. The usual anchor light was set on the G. S. R. on the evening before.

*Held*, upon a conflict of testimony as to whether the schooners were in or far out of the channel, that the schooner G. S. R. was in or so near the navigable part of the river that she was bound to maintain the usual anchor light; that she had not done so, and that the collision was to be solely attributed to that fault on her part; that the I. B. was not so far out of her rightful course as to make her answerable for the collision, in the absence of a proper light upon the schooner.

Whether the schooner was also bound to keep an anchor watch, or exhibit a torch-light to the approaching steamer, under section 4234, *quære*.

In Admiralty.

*E. D. McCarthy*, for libellant.

*Owen & Gray*, for claimant.

Brown, D. J. This libel was filed by the owner of the schooner George S. Repplier, to recover damages caused by the steamer Isaac Bell running into her as she lay at anchor in the James river, about 2 o'clock in the morning of August 18, 1879. The place of the collision was several miles above Newport News, nearly abreast of the White Shoal light. The river at this point is from three to four miles wide, running in a south-easterly course. The White Shoal is a narrow bank, about a mile in length, running in the same course with the river, and about midway from shore to shore. The White Shoal light is situated upon its southerly edge. The main channel runs along the southerly side of this shoal, and is nearly half a mile in breadth, with a depth of water varying from 26 to 16 feet. The deeper portion is nearer to the White Shoal. On the southerly side of this channel the water becomes gradually shallower, and at a distance of half a mile abreast of the light is 15 feet in depth, and thence shoals gradually to the southerly shore, about a mile and a quarter further distant. These shoals furnish a favorite anchorage ground for light-draught vessels.

At about 6 o'clock in the evening of August 17th, the George S. Repplier, bound from Richmond to Philadelphia with a cargo of paving-stones, came to anchor at a point a little below the light, and

at a distance from it variously estimated in the testimony from a quarter of a mile to a mile. Shortly before, the schooner Alexandria, also bound down the river, had come to anchor at a point a little below the Repplier, and from 100 to 200 yards nearer to the southerly shore. The night was dark, but neither foggy nor thick. The Repplier had on board the captain, a mate, and a colored lad acting as steward. No watch was kept during the night, but before going to bed they set the usual light in the fore-rigging, about eight feet above deck, and the Alexandria had a similar light.

The Isaac Bell belongs to the Old Dominion line of steamships, running from Richmond to New York. On that evening she came down the river upon one of her regular trips, and, some time before reaching the White Shoal light, sighted the light of the Alexandria, as well as the White Shoal light. She proceeded in her usual course, S. E. by E., keeping the light of the Alexandria a little off her starboard bow. As she approached this light her wheel was put to starboard, and a few moments afterwards she ran upon the Repplier, her paddle-box upon the port side, carrying away the bowsprit and rigging of the schooner, sweeping along her side, and causing such injury that in a few hours afterwards she sank. No light was seen upon the Repplier, prior to this collision, by those on board the Isaac Bell. The pilot and wheelsman were in the pilot-house at the time, and the lookout at the bow. They all testify that no light was visible upon the Repplier, and that she was not perceived at all until just before the collision, shortly after veering to port to avoid the Alexandria. No person was awake on board the Alexandria or the Repplier at the time of the collision, unless the testimony of the colored lad, that he was on deck at the time, is to be credited.

A few hours before, at about 11 o'clock at night, the steamer Norfolk, of the Clyde line, had also gone down the river upon one of her regular trips, and nearly in the same track. Her captain testified that his course is usually somewhat nearer to the White Shoal light than that of the Isaac Bell, and that he saw the light of the Alexandria; that he passed from 40 to 50 yards inside of the Repplier, and near enough to distinguish her, and that she had no light then burning; that he "took particular notice, and if there had been a light he would certainly have seen it." The pilot, the quartermaster who was at the wheel, and the lookout of the Isaac Bell, all of whom were obviously attending to their duties at the time, testify to the same thing. They saw the light of the Alexandria long before. She was properly avoided, and there is no reason to suppose if the

Replier had also had her proper light at that time burning it would not have been seen and the collision avoided.

The only witness on the part of the libellant to the contrary is the colored lad, Roy. He testifies that at 3:30 A. M., and about half an hour before the collision, he heard a sort of roaring, which woke him up, and that he then went forward in the schooner; that he next attended to his fire, then went back and remained watching the approaching steamer and seeing her red light only; that he apprehended no collision; that he did not call the captain, because it was not his business to call him, and that he did not hail the steamer or exhibit any torch. He testifies that the light which he had set the evening before was at this time still burning brightly. One of the witnesses testified that Roy had stated the morning after the collision that he was asleep at the time. His manner upon the stand was peculiar, and his answers to every question were given with a deliberation and delay altogether unexampled. His quickness of apprehension, exhibited in other ways, forbids the supposition that this was the result of any lack of intelligence or of comprehension of the questions, and, in the face of the testimony of the witnesses from the Isaac Bell and of the captain of the Norfolk,—a wholly disinterested person,—I feel bound to reject Roy's testimony on this point. The captain of the Replier testified that his lamp was a new one, and Roy said that it gave a better light than the White Shoal light. The captain admitted that it had sometimes gone out after an hour or two's burning, and that its continuance depended upon its being properly trimmed beforehand; and, although they testify that it had been properly trimmed the afternoon preceding, I feel bound to hold that the weight of testimony decidedly shows that the lamp was not burning after 11 o'clock, when the Norfolk passed. Unless, therefore, the Replier was at a place of anchorage where she was legally absolved from the duty of keeping any anchor light, she must be held in fault.

It has been held by the supreme court that "the absence of a light from a sailing-vessel will not excuse a steamer from coming into collision with her, whether at anchor or sailing, in a thoroughfare out of the usual track of the steamer." *N. Y. etc., v. Calderwood*, 19 How. 241, 246; *The Granite State*, 3 Wall. 310, 313; *The Clarita*, 23 Wall. 1, 13. In the last case cited the facts did not call for any application of this principle; in the second, the barge was fastened to the end of the pier; and in the first case the schooner was out of the steamer's usual track—"as near the eastern shore as possible;" she

"carried a light from her breast-hook, and the steamer was hailed and told to keep off." These cases are, therefore, plainly to be distinguished from the present, since the Repplier, although at anchor in the stream in a dark night, afforded to the steamer no means of knowing her position until too late to avoid the collision. The principle of the above cases cannot be here applied unless it be found that the Repplier was at anchor at such a place in the river that the steamer had no legal justification or excuse for coming into her neighborhood.

It is impossible to reconcile the testimony of the different witnesses as to the precise place of anchorage. The captain, the mate, and the cook of the Repplier, and the captain of the Alexandria, all give the bearing of the light by the compass, and their estimate of its distance. All except the mate testify that the light bore N. N. W. from the place of anchorage; the mate testifies that it bore N. by W.; the libel states that it bore N. W. nearly a mile distant, and the captain of the Alexandria gives the same estimate of distance; while the captain of the Repplier gives the distance at about half a mile from the light, and Roy, the colored lad, at somewhat less. By reference to the chart, which is put in evidence, it will appear that a distance of half a mile from the light upon a course N. N. W. from the place of anchorage, as testified to by three of these witnesses, would locate the vessel in mid-channel, in at least 18 feet of water, and right in the usual track of steamers; and the location and distance as given by the libel would also fall in the same track. The captain testified that he could not tell whether the place of anchorage was in the channel or not; that the schooner drew, loaded, eight feet, and, with the center-board down, seven feet more; that he came to anchor before hauling up the center-board, and that he could not have proceeded much further away from the channel with the center-board down. A depth of only 15 feet could be reached within the distance of half a mile from the light, only directly abreast of it, at a point from which the light would bear N. E. by E. instead of N. N. W., as three of the witnesses agree in stating; that is, at a point at least half a mile further up the stream than the place assigned through the compass bearings given by the libellant's witnesses. The mate testifies that the place of anchorage was about abreast of the light; that is, directly across the river. The captain of the Alexandria says they were a little below the light. As the river is four miles wide and the shore irregular, any observation of the place of anchorage, as to whether it was abreast of the light or directly across

the river, might easily be very inaccurate, and would be liable to much variation in the estimate of direction.

The watch of Tapley, the lookout on the Isaac Bell, began at 2 o'clock, when he came on deck some time previous to the steamer reaching the White Shoal light, and he saw the collision. Walthall, the pilot, testifies that he noted the time of passing the White Shoal light at eight minutes past 2, and that the collision was some two or three minutes after that. The steamer was going from eight to ten miles an hour, and, taking the lowest estimate of speed and time, the collision, according to Walthall's testimony, must have been about 1,400 feet, or about a quarter of a mile below the light; and this point would still be further up the stream than the point indicated by the compass bearings as given by the libel and by the libellant's witnesses. These statements on both sides, in ways wholly independent, corroborate each other, and tend to show that the place of anchorage was considerably below the light, and in this direction a given distance from the light would bring the place of anchorage much nearer the steamer's track than the same distance directly abreast of the light. In the direction indicated by the compass bearings, as sworn to, a depth of 15 feet only would be found at not less than a mile distant from the light, and no one but the captain of the Alexandria gives any such estimate of distance.

The mate of the Repplier testifies that he hove the lead, and found the depth of water was two and a half fathoms. He says he did this after the vessel had anchored; that he hove it but once; that he had no particular purpose in doing so, and that he told no one at the time of the depth; but as the Repplier, with her center-board down, drew 15 feet of water, it is hardly probable that the schooner went upon shoal water until she struck bottom. Nor does the captain claim that; he only says that he could not have gone in much further, and it was then low water. The captain of the Alexandria, who was from 100 to 200 yards distant, and about one length further down the stream, testified that he anchored in two and a half fathoms of water, but does not state whether he hove the lead, or whether this was merely his estimate of the depth; and if that was the true depth where the Alexandria anchored, the depth of water from 100 to 200 yards nearer the light must have been somewhat greater. As the heaving of the lead by the mate was without any special object, and as no action was based upon it, it can only be regarded as a casual observation, at best, and not to be relied on for perfect accuracy.

The Isaac Bell drew, loaded, 14 feet of water, and the Norfolk about the same. Both vessels passed the White Shoal light very nearly in the same track. It is in the highest degree improbable that both vessels would have deviated largely from their ordinary course in the same night, and in the same direction, from no assignable cause. Those on board of each testify that they were upon their usual track, and that the Replier was "in the channel," or "near the channel." Two witnesses from the light-house, who saw the schooners anchor, (to whose testimony, however, standing alone, I should not ascribe much weight,) also say that they were right in the channel.

From all this testimony it seems perfectly clear that the Replier could not have been anchored so far from the channel as legally to dispense with the maintenance of the ordinary anchor light. Her position was certainly near the track of steamers. The depth of water there at half tide, when the Isaac Bell passed, must have been at least three feet in excess of her draught. It was in the navigable part of the river, and had an anchor light been exhibited by the Replier there is no reason to suppose she would not have been avoided as the Alexandria was avoided; nor should I be warranted in holding, upon evidence so discrepant, that both the Isaac Bell and the Norfolk were so far out of their ordinary track as to be in a part of the river where they had no lawful right to navigate, so as to constitute *ipso facto* negligence contributing to the collision.

It is not necessary to consider the point raised by the claimant, whether the absence of an anchor watch, (*The Clara*, 13 Blatchf. 509; 102 U. S. 200,) or the failure to exhibit a torch-light, as provided by section 4234 of the Revised Statutes, would of themselves be a bar to the libellant's recovery. *The Samuel H. Crawford*, 6 Fed. Rep. 906; *Brainard v. The Steamer Narragansett*, 3 Fed. Rep. 251; *The Leopard*, 2 Low. 238; *The Eleanor*, 17 Blatchf. 88. There are other contradictions and irreconcilable discrepancies in the evidence as to other points in the case, on both sides, to which I do not think it necessary to refer, as the two points above decided are sufficient to dispose of the case. There was ample room for the Replier to have proceeded further to the south for anchorage, and no difficulty in her doing so upon raising the center-board, wholly or in part; and the collision must be deemed to have arisen wholly from her fault in unnecessarily anchoring in, or too near, the channel, and when thus anchored in not maintaining a suitable anchor light.

The libel must, therefore, be dismissed, with costs.

*In re CODDING & RUSSELL, Bankrupts.**(District Court, W. D. Pennsylvania. December 21, 1881.)*

## 1. PARTNERSHIP—REAL ESTATE.

Real estate owned and held by copartners as partnership property, and brought into the firm stock, is not converted absolutely and for all purposes. It is to be treated as personalty, in so far as may be necessary to secure the payment of the firm debts and advances made by the partners respectively, but for every other purpose it remains real estate.

## 2. SAME—JUDGMENT—LIENS.

A judgment against a partnership for a partnership debt, entered by confession of all the partners, is a lien upon the partnership real estate.

In Bankruptcy. *Sur* exceptions to register's report, distributing fund from sale of real estate.

*Wm. A. Stone*, for report.

*John W. Mix and Williams & Angle*, for exceptants.

ACHESON, D. J. This contest is over a fund realized from the real estate of the bankrupts, sold by the assignee divested of liens. The claimants are Lawrence Butler and Matthew Jackson, two judgment creditors of the bankrupt firm on the one hand, and, on the other, the assignee in bankruptcy. The judgments are not assailed as unlawful preferences, but it is denied that they were liens against the real estate; and therefore the assignee claims the fund for the benefit of the general creditors of the firm.

No exceptions having been filed to the register's findings of fact, their correctness will be assumed. These findings are substantially as follows

John A. Coddington and Chauncey S. Russell, the bankrupts, composed the firm of Coddington & Russell. The said real estate was owned and held by the bankrupts, as copartners, for partnership purposes and as partnership property. The judgment of Lawrence Butler was entered against "Coddington, Russell & Co.," (a name by which the firm was formerly designated,) upon a judgment note signed "Coddington, Russell & Co." The judgment of Matthew Jackson was entered against "Coddington & Russell," upon a judgment note signed "Coddington & Russell." The consideration of each note was money loaned to and used by the partnership. Both partners participated in giving the notes, and the judgments thereon were each entered at the suggestion of both the partners.

Any question growing out of the Butler judgment note having been entered up in the old firm name may be dismissed from the case; for the Jackson judgment alone, under the rule which prevails in this court to allow interest on a judgment down to the time of distribu-

tion, would absorb the whole fund; and Jackson does not question the lien of Butler's judgment, or his right to be paid out of the proceeds of sale. The question upon which the case turns is whether a judgment against a partnership, for a partnership debt, entered by confession of the firm, and at the suggestion of all the partners, is a lien against the partnership real estate. The register held that it was not, and he awarded the fund to the assignee in bankruptcy. The decision of the register rests exclusively upon the assumption that partnership real estate is personalty, and therefore not the subject of a judgment lien. But the doctrine that partnership real estate is to be treated as personalty is not to be pushed too far. Real estate brought into a firm as stock is not converted absolutely and for all purposes. The conversion manifestly has its limitations. For example: partnership real estate unquestionably is governed by the statute of frauds. Again, to pass the title each partner is required to join in the conveyance. Story, Part. § 94; Parsons, Part. § 377.

I suppose no one would seriously maintain that on an execution against a firm a constable could seize and sell their real estate. It was held in *Foster's Appeal*, 74 Pa. St. 391, that after payment of the firm debts and the advances made by the surviving partner, the remaining share of a deceased partner in partnership real estate passed, not to his personal representatives, but to the widow and heirs. Conversion of partnership real estate is allowed to secure, in the interest of the partners themselves, the payment of the firm debts and advances made by the partners respectively. *Id.* Therefore, the true doctrine, as I conceive, is that in so far as may be necessary to attain those ends, partnership real estate is to be treated as personalty, but for every other purpose it remains real estate, and is subject to the principles and laws applicable to that species of property. Why, then, is partnership real estate not bound by the lien of a judgment against the partnership for a partnership debt, especially where such judgment is entered by confession of the firm and at the instance of all the partners? From a very early period it has been the settled law of Pennsylvania that a judgment is a lien on every kind of right,—on every sort of beneficial interest,—in real estate, vested in the debtor at the time of the judgment. *Caskhuff v. Anderson*, 3 Binn. 9; *Troubat & H.* §§ 58, 778; *Price, Liens*, 277.

The general creditors of a firm are preferred in the distribution of firm assets wholly by virtue of the equities of the partners, and not on account of any equities of their own. They themselves have no lien upon the partnership property. What right, therefore, have they,



or an assignee in bankruptcy who represents them, to gainsay the lien of a judgment upon the partnership real estate where that judgment is for a firm debt, and was entered against the partnership by the confession of the firm? The validity of a mortgage given by partners upon partnership real estate was distinctly recognized in *Lancaster Bank v. Myley*, 13 Pa. St. 544. But if the partners may encumber their real estate by mortgage, why may they not do so by judgment? Undoubtedly it was the intention of Coddington & Russell to give Butler and Jackson judgment liens, and I am at a loss to see upon what principle that intention is to be frustrated by the assignee in bankruptcy, who stands, in this matter, in no better position than the bankrupts themselves.

While, perhaps, the precise question now before me has not been judicially determined, yet in more than one case the validity of such judgment liens, it would seem, has been assumed. *Overholt's Appeal*, 12 Pa. St. 222; *Erwin's Appeal*, 39 Pa. St. 535. And it is said by Mr. Price, in his work on liens, that a judgment for a firm debt would bind the real estate of the firm. Price, Liens, 280, 281.

And now, December 21, 1881, the exceptions to the register's report are sustained; and it is ordered that the fund for distribution be applied first to the payment of the judgment of Lawrence Butler, and the residue to the judgment of Matthew Jackson, and that the assignee pay the fund to said judgment creditors in accordance with this decree.

NOTE. The general rule that in equity partnership real estate is treated as mere personalty and is governed by the general rules applicable to that species of property, is well settled. See *Nicoll v. Ogden*, 29 Ill. 323; *Mauck v. Mauck*, 54 Ill. 281; *Arnold v. Wainwright*, 6 Minn. 358; *Davis v. Christian*, 15 Gratt. 11; *Scruggs v. Blair*, 44 Miss. 406; *Whitney v. Cotton*, 53 Miss. 689; *Hill v. Beach*, 12 N. J. Eq. 31; *Ludlow v. Cooper*, 4 Ohio St. 1; *Moderwell v. Mullison*, 21 Pa. St. 257; *Day v. Perkins*, 2 Sandf. Ch. 359; *Andreos v. Brown*, 21 Ala. 437; *Black v. Black*, 15 Ga. 445; *Galbraith v. Gedge*, 16 B. Mon. 631; *Divine v. Mitchum*, 4 B. Mon. 488; *Coles v. Coles*, 15 Johns. 159; *Pratt v. Oliver*, 3 McLean, 27.

This rule, however, grows out of the peculiar nature of the partnership relation, and is adopted for the purpose of doing justice between partners, or between them and others having dealings with them, and for the purpose of properly adjusting the relations between them, or between them and others having dealings with, or relations to, the partnership. It is not an arbitrary rule, by which a court of equity transmutes real estate into personal property, when it is once owned and possessed by a partnership, and causes it to take that character outside of, and independent of, the exigencies of the partnership. *Black v. Black*, 15 Ga. 445. Real property, purchased with partner-

ship funds, for partnership purposes, and which remains after paying the debts of the firm and adjusting the equitable claims of the different members of the firm, as between themselves, is accordingly considered and treated as real estate. *Buckley v. Buckley*, 11 Barb. 43; *Scruggs v. Blair*, 44 Miss. 456. See, however, *Thayer v. Lane*, Walk. Ch. 200. And, where not needed for such purposes, it descends to the heir, like other real estate. *Williamson v. Fountain*, 7 J. Bax. (Tenn.) 212; *Foster's Appeal*, 74 Pa. St. 391. See, also, *Yeatman v. Woods*, 6 Yerg. 20; *Gaines v. Catron*, 1 Humph. 514; *Piper v. Smith*, 1 Head, 93; *McGrath v. Sinclair*, 55 Miss. 89; *Summey v. Patton*, 1 Wins. (N. C.) Eq. (No. 2) 52. And, in the settlement of the estate of a deceased partner, any real estate of the partnership, remaining after the fulfilment of all partnership obligations, is to be treated as realty. *Wilcox v. Wilcox*, 13 Allen, 252. Real estate owned and used by a firm may, however, be deemed personalty, not only for purposes of the partnership, but for distribution also, when the intention of the partners that it should be so treated appears. In the absence of their agreement, express or implied, to this effect, it should only be so regarded for the purposes of the partnership, and after these are answered, the surplus should be held to be real estate for all other purposes. *Lowe v. Lowe*, 13 Bush, 688. See, also, *Scruggs v. Blair*, 44 Miss. 406. Compare *Bank of Louisville v. Hale*, 8 Bush, 672; *Cornwall v. Cornwall*, 6 Bush, 369. Partnership real estate can only be conveyed as real estate by those holding the legal title; and if only one partner executes the deed, whether it be in his own name or in the name of the firm, such deed will not convey more than the interest of the partner executing the conveyance. *Coles v. Coles*, 15 Johns. 159; *Jackson v. Stanford*, 19 Ga. 14; *Davis v. Christian*, 15 Gratt. 11; *Anderson v. Tompkins*, 1 Brock. 456; *Willey v. Carter*, 4 La. Ann. 56; *Arnold v. Stevenson*, 2 Nev. 234; *Donaldson v. Bank of Cape Fear*, 1 Dev. Eq. 103; *Goddard v. Renner*, 57 Ind. 532.

Partnership real estate must, like other partnership assets, be first applied to the satisfaction of the partnership debts. *Matlock v. Matlock*, 5 Ind. 403; *Winslow v. Chiffelle*, 1 Harp. Ch. 25; *Hunter v. Martin*, 2 Rich. 541; *Overholt's Appeal*, 12 Pa. St. 222; *Marvin v. Trumbull*, Wright, 386; *Bryant v. Hunter*, 6 Bush, 75; *Cornwall v. Cornwall*, Id. 369; *Nat. Bank of Metropolis v. Sprague*, 20 N. J. Eq. 13; *Uhler v. Semple*, Id. 288. The doctrine, however, that a separate debt of one partner shall not be paid out of the partnership property till all the partnership debts are paid, is said to be applicable only where the principles of equity are invoked to interfere in the distribution of the partnership property among the creditors. *Mittnacht v. Smith*, 17 N. J. Eq. 259. See, also, *Gillaspy v. Peck*, 46 Iowa, 461.

As the ordinary creditors of an individual have no lien on his property, and cannot prevent him from disposing of it as he pleases, so the ordinary creditors of a firm have no lien on the property of the firm, so as to be able to prevent it from parting with that property to whomsoever it chooses. 2 Lindley, Part. (Ewell's Ed.) \*654, 655, and cases cited in note. Partners have the power, therefore, while the partnership assets remain under their control, to appropriate any portion of them to pay or secure their individual debts. A mortgage, given by them to secure individual debts, fairly due, is not rendered void by the mere fact that it operates to give individual debts a preference

over demands of the firm; nor will such mortgage be set aside for that reason by a court of equity, unless, perhaps, when created in contemplation of insolvency, to give an improper preference. *Nat. Bank of Metropolis v. Sprague*, 20 N. J. Eq. 13. See, also, *Waterman v. Hunt*, 2 R. I. 298. If a partnership may thus execute a valid mortgage, to secure the *individual* debt of one partner, much more may it legally encumber its real estate, by mortgage, to secure a *firm* debt, as in *Lancaster Bank v. Myley*, 13 Pa. St. 544, cited in the principal case. And, as stated by the learned judge who delivered the opinion in the principal case, if the partners may encumber their real estate by *mortgage*, no reason is seen, there being no unlawful preference created, why they may not resort to *any other lawful method* of creating a lien upon such property. No case has been found upon the precise question involved in the principal case, but, upon principle, its correctness seems beyond question.

*Union College of Law of Chicago, January 18, 1882.*

MARSHALL D. EWELL.

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### HERDSMAN and others v. LEWIS and others.

(*Circuit Court, E. D. New York. January 30, 1882.*)

#### 1. EQUITY—ISSUES OF FACT.

Neither party to a suit in equity brought in a federal court has an absolute right to have a question of fact arising in the cause passed on by a jury.

On a Motion to Award Feigned Issues.

*H. P. Herdsman*, for complainants.

*Blatchford, Seward and Griswold & De Costa*, for defendants.

BENEDICT, D. J. This is a motion in an equity cause for the trial before a jury upon feigned issues of certain questions of fact raised by the pleadings. It appears by the papers that no testimony whatever has yet been taken in the cause, and that the decision may turn upon the question of fact, whether certain instruments described in the bill, and against which the plaintiffs seek relief, were procured by fraud and duress. While it is not doubted that a court of the United States, sitting in equity, may in a proper case direct questions of fact arising in an equity cause to be passed on by a jury, neither party has an absolute right to such a trial. Whether a jury trial be in any case necessary or desirable depends upon the facts of the case. In this case I see no necessity at this time for such a proceeding. Feigned issues are awarded, it is said, "in order to relieve and ease the conscience of the court," but here the necessity of such relief does not as yet appear. The surmise that the testimony, when taken before

an examiner, will prove conflicting and uncertain, affords no foundation for present action by the court.

Another of the reasons assigned for granting feigned issues, viz., because "the court is so sensible of the deficiency of trial by written evidence," (2 Daniell, Ch. Pr. 631,) also fails in this case, for it is quite apparent that on a jury trial the testimony would be for the most part in writing, owing to the circumstance that the transaction in question occurred in Texas.

For these reasons the motion to award feigned issues in the case at this time is denied.

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WOOSTER v. CLARK and others.

(Circuit Court, S. D. New York. August 29, 1881.)

I. TESTIMONY—RULE 69.

Equity rule 69 is imperative that no testimony taken after time shall be allowed to be read at the hearing.

On Motion to Strike out Testimony.

BLATCHFORD, C. J. The motion to strike out the testimony taken on the part of the defendants must be granted. Rule 69 is imperative, that no testimony taken after time shall be allowed to be read at the hearing. The plaintiff duly objected on the record to the taking of what was taken, on the ground that it was taken after time, and such objection has never been waived. Moreover, the defendants, after that, specially moved for time to take proofs, and the motion was denied.

The proof of the sale of a binder is sufficient. It is plain that it infringes claims 2, 4, and 5. The granting of the reissue to the plaintiff is sufficient proof of his title to sue.

There must be a decree for the plaintiff.

## MILLIKEN v. ROSS.

(Circuit Court, E. D. Louisiana. June, 1881.)

## NEW TRIAL.

After two concurring verdicts the court will not grant another new trial, unless the jury have manifestly disregarded the law as given them by the court.

## On Rule for New Trial.

*J. P. Hornor* and *F. Baker*, for plaintiff.

*Kennard, Howe & Prentiss*, for defendant.

*BILLINGS, D. J.* This case is submitted on an application for a new and third trial, and to set aside the second of two concurring verdicts. In the matter of granting new trials and setting aside verdicts, the circuit courts are governed by the statutes of congress, (1 St. 83, § 17,) and "where there has been a trial by jury" are restricted to "reasons for which new trials have usually been granted in the courts of law." The question, therefore, is one of usage in the common-law courts. One verdict has already been set aside as being against the weight of testimony. The question now is whether a second verdict, upon substantially the same testimony shall be set aside. There is, I think, a well-settled rule that in such a case the court will defer to a second verdict.

In *Winnerton v. Marquis of Stafford*, 3 Taunt. 233, Lord Mansfield held that, although the judge who last tried the cause thought the evidence against the verdict preponderated, nevertheless, when the evidence was conflicting, the court ought to refuse to grant a second new trial; Lord Mansfield remarking that "it could never be right to make no weight of two verdicts in order to take a chance of a third." See, also, to the same effect, *Fowler v. Aetna Fire Ins. Co.* 7 Wend. 270.

There undoubtedly are cases when it would be the duty of the court to set aside any number of verdicts. But those are cases in which juries manifestly disregard the rules of law as given to them by the court. But this is not such a case. The question here is one of fact, viz., the good faith or reality of a claimed transfer of a promissory note. When two successive verdicts are contradictory, and the last is unsatisfactory to the court, a new trial may be ordered. *Parker v. Ansel*, 2 W. Bl. 963. It may also be done after two concurring verdicts. *Goodwin v. Gibbons*, 4 Burr. 2108. But this is seldom done. *Clerk v. Udall*, 2 Salk. 649; *Chambers v. Robinson*, 2 Strange, 692.

The new trial is refused.

**HATCH v. INDIANAPOLIS & SPRINGFIELD R. Co. and others.**

(Circuit Court, D. Indiana. January 21, 1882.)

**1. MASTERS IN CHANCERY—REPORTS OF, AND EXCEPTIONS THERETO.**

Masters are usually employed in taking accounts and making computations, and in making inquiries and reporting facts. In such references it was usual for the masters to prepare drafts of their reports before argument, and argument was heard by the masters only on objections to the drafts. In such cases, manifestly, parties were entitled to an inspection of the drafts, and to be heard on their objections thereto.

**2. SAME—PRACTICE.**

But if a reference is made embracing questions of law and fact, and after hearing the testimony, and the arguments of counsel, the master prepares a report of his findings, there is no good reason for observing the formalities of the old practice in submitting the report to the parties for hearing thereon before the master.

**3. SAME—SAME.**

It is not the practice in this district, nor in this circuit, for the master, after having heard full argument, to submit a draft of his report to the parties for a hearing thereon upon objections thereto. When a case has been fully argued in the first instance the legal right of the unsuccessful party to make objections before the master to the draft of his report, and argue the same, is not recognized in practice.

**4. SAME—RULES 77 AND 83 OF THE SUPREME COURT.**

The rules of the supreme court for conducting references before masters provide a simple and expeditious procedure, and were obviously intended to dispense with the old formalities incident to the settling, etc., of the master's report. *Vide* rules 77 and 83. These rules establish a procedure in themselves, and reference to the practice of the high court of chancery in England, as it existed in 1842, for the formalities attending the settlement, or making of masters' reports, and the entering of exceptions thereto, is unnecessary.

**In Chancery.**

*Edwin H. Abbott and C. D. Page*, for complainant.

*Baker, Hood & Hendricks, Roache & Lamme*, and *James M. Johnson*, for respondents.

GRESHAM, D. J. The bill in this case alleged that the railroad company was indebted to the complainant in a large sum for labor and materials furnished in the construction of a part of the respondents' road; that certain stockholders, who were made defendants, had never paid their stock subscriptions; and that the company was insolvent and the road had been abandoned. The court was asked to ascertain and decree the amount due from the company to the complainant; also for a decree against the individual stockholders, requiring them to pay into court a sum sufficient to satisfy the complainant's demand and costs of suit.

After the case was put at issue it was referred to the master to take and report the testimony and a finding thereon. Both parties appeared before the master and took testimony, without objecting to the terms of the reference. Having heard the arguments of counsel on both sides, the master prepared his report and filed it in the clerk's office on the twenty-fourth day of August, 1880. This was done without notice to either party that the report was ready to be filed. The same day, or within a day or two thereafter, the complainant's counsel were furnished with a copy of the report. Nothing further was done in the case until the twenty-third day of September, when the complainant's counsel filed a written motion to recommit the report to the master for review, because the master had gone beyond the matters to him referred, had omitted to report upon divers matters properly included in the reference, and had filed his report without submitting the same in draft to the complainant, and allowing him opportunity to make his objections thereto, and thus lay the requisite foundation, under the rules and practice established by the supreme court, for taking valid exceptions to the report if the master should overrule any of said objections.

It is urged by the complainants' counsel that, after writing out his report, and before filing it in the clerk's office, the master should have notified counsel that it was in draft, thereby affording them opportunity to point out supposed errors, and make objections to his conclusions, so as to give him an opportunity of considering and correcting his report, and that no exceptions, according to correct chancery practice, can be heard by the court which have not been carried in before the master.

It is also further urged by the counsel that the equity rules do not cover all the details of equity practice, and that this is evident from rule 90, which adopts the English practice in omitted cases, as it was known and understood when the equity rules were adopted. These rules were promulgated by the supreme court and took effect on the second day of August, 1842. It seems to have been the practice in England, for some time before our equity rules were adopted, that a party should never except, unless he had first objected to the draft of the report before the master, and when there was no objection brought in it was allowed good cause to discharge the exception. That being the practice, of course the unsuccessful party was entitled to notice that the report was in draft. 2 Daniell, (2d Am. Ed.) 1483. This seems to be recognized as the correct practice in some of the courts of this country. *Troy, etc., v. Corning*, 6 Blatchf. 328; *Gaines v. New*

*Orleans*, 1 Woods, 104; *Church v. Jaques*, 3 Johns. Ch. 77; *Gleaves v. Ferguson*, 2 Tenn. Ch. 589; *Gordon v. Lewis*, 2 Sumn. 143; *Byington v. Wood*, 1 Paige, 145.

In *Story v. Livingston*, 13 Pet. 359, the court say:

"Strictly, in chancery practice, though it is different in some of our states, no exceptions to a master's report can be made which were not taken before the master; the object being to save time and to give him an opportunity to correct his error or to reconsider his opinion. Dick. 103. A party neglecting to bring in objections cannot afterwards except to the report, (Harr. Ch. 479,) unless the court, on motion, see reason to be dissatisfied with the report, and refer it to the master to review his report, with liberty to the party to take objection to it. 1 Dick. 290; Madd. Rep. 340, 555. But, without restricting exceptions to this course, we must observe that exceptions to a report of a master must state, article by article, those parts of the report which are intended to be excepted to."

While the practice contended for by the complainant is here referred to as correct, according to strict rule, the court declined to enforce it against the excepting party.

*McMicken v. Perin*, 18 How. 507, was decided in 1855, some years after the adoption of the equity rules, and without alluding to rule 88. After referring to *Story v. Livingston* as deciding that no objections to a master's report can be made which are not taken before the master, the court says: "The court will not review a master's report upon objections *taken here* for the first time." The exceptions to the master's report had not been taken in the circuit court, but for the first time in the supreme court.

The practice contended for by the complainant was referred to in *Story v. Livingston* as being correct according to strict rules, without, however, being enforced; and in *McMicken v. Perrin* the question was not before the court.

Masters are usually employed in taking accounts and making computations, and in making inquiries and reporting facts. In references of this character drafts of the reports have been prepared before argument, and argument was heard before the master only on objections to the drafts. In such cases it is clear the parties were entitled to inspect the reports and to be heard on such parts of them as were objected to. But if a reference is made embracing questions of law as well as fact, and after hearing the testimony and the arguments of counsel, as was done in this case, the master prepares a report of his findings, I can see no good reason for observing the formalities of the old practice. It resembles a trial before a referee



when the parties are fully heard, and their respective points and positions are fully stated to and understood by the trier. This case was argued at great length before the master, and he, no doubt, comprehended the exact points in controversy. If the complainant's motion should be sustained, his counsel would probably go before the master, and, in support of objections to the draft, again repeat the arguments that he urged in the first instance.

It is not the practice in this district, nor, as I understand, in this circuit, for the master, after hearing full argument, to prepare a draft of his report and then notify the parties and summon them to make objections. When the case has been fully argued in the first instance, the legal right of the unsuccessful party to go before the master, make objections to the draft of the report, and argue those objections, is not recognized in practice.

The equity rules provide for conducting references before masters in a simple and expeditious manner. It is fair to assume that in adopting these rules the supreme court meant to dispense with the old formalities incident to settling the master's report. Rule 77 provides that the—

“Master shall regulate all the proceedings in every hearing before him, upon every such reference, \* \* \*” and “the master,” says rule 83, “as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the filing of the report to file exceptions thereto; and if no exceptions within that period are filed by either party, the report shall stand confirmed the next rule-day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session; or, if not, at the next sitting of the court which shall be held thereafter.”

Nothing is said here, or in any of the other rules relating to practice before masters, about notice to parties that the report is in draft, and to appear before the master and settle it. “As soon as his report is ready,” “the master shall return it into the clerk's office,” and “the parties shall have one month from the filing of the report to file exceptions thereto.” The report is ready, within the meaning of rule 83, when it is written.

It is not necessary to refer to the practice of the high court of chancery in England, as it existed in 1842, for the formalities attending the settlement or making of masters' reports, and the entering of exceptions thereto. These matters are provided for in the equity rules. I have considered the only question that seemed to be relied

on in the argument of the motion. During the argument the complainant's counsel, inasmuch as they might have been misled as to the practice in this district, were offered leave by the court still to file exceptions to the report, notwithstanding the fact that the time limited by the rule for taking exceptions had elapsed. This offer they declined. In declining it counsel said they preferred to stand upon their legal rights.

Motion overruled.

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UGLESBY and another *v.* SILLOM and Husband.

(Circuit Court, E. D. Louisiana. July, 1881.)

1. DOMICILE—CITATION.

By the laws of Louisiana the domicile of the wife follows that of the husband. Therefore, a citation for the wife, left at the domicile of the husband, in this state is good, and is binding on her.

In Equity.

*Mott & Kelly*, for plaintiffs.

*Hudson & Fearn*, for defendants.

BILLINGS, D. J. This suit is instituted to foreclose a mortgage executed by a married woman upon her property. The first question is as to the validity of the service of the subpœna. The service was made at the domicile of the husband, there being no legal separation. This is a valid service upon the wife, according to the rules in equity of the supreme court, and according to our Code of Practice. The rule of the supreme court undoubtedly refers the question of domicile to the laws of the state, and the separation in fact does not prevent the husband's domicile being that of the wife. The service is, therefore, legal, and Mrs. Sillom is properly called upon to answer. In fact, this defendant, who is a married woman, has lived in France for the past 17 years, although the legal domicile of her husband, and consequently that of herself, is within this state. Though the service is legal and brings her before the court, the time which should be allowed her to consider in a cause should be determined by her actual residence, and should be sufficient to enable her, as to matters of fact, to communicate with her solicitors. The question here being as to whether a receiver should be appointed to administer a plantation, and the proof being that it is well administered; and, further, it being impossible that any crop can be taken from the plantation until late in the autumn,—there is little risk of damage to

the complainants in allowing reasonable delay for the purpose of suitable preparation on the part of the real defendant, whose interests are distinct from those of her husband.

It is therefore ordered that the hearing of the application for the appointment of a receiver be continued to the third Monday of November.

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### MCGOWAN v. LA PLATA MINING & SMELTING Co.

(Circuit Court, D. Colorado. January 11, 1882.)

#### 1. MASTER AND SERVANT.

A master is bound to inform his servant of facts within his knowledge affecting the safety of the servant in the service to be performed, when the latter is ignorant of them.

#### 2. PRESUMPTIONS.

The law will not presume that men of ordinary intelligence know the explosive power of hot slag when thrown into water.

On Motion for a New Trial.

*J. D. Murphy and T. A. Green*, for plaintiff.

*J. F. Frueauff*, for defendant.

HALLETT, D. J. That a master is bound to inform his servant of facts within his knowledge affecting the safety of the servant in the service to be performed, when the latter is ignorant of such facts, seems to be conceded.

A lot-owner employed a carpenter to build for him, but did not inform the carpenter that his title to the lot was contested. The carpenter, pursuing his labor on the lot without suspicion of danger, was attacked by the parties claiming adversely to the employer, and severely injured. On this the employer was held liable in damages for his omission to notify his servant of the danger impending. *Baxter v. Roberts*, 44 Cal. 187.

A miner employed to sink a shaft was not informed of a crack or opening in the side of the shaft, of which his employer had knowledge. The shaft caved in and injured the miner, and his employer was held liable for his negligence in not giving notice of the crack in the shaft. *Strahlendorf v. Rosenthal*, 30 Wis. 675.

But it is contended that the rule cannot be applicable to the case at bar, as it relates only to facts withheld from the servant, and not to instruction in the principles of natural philosophy. The water in front of the furnace, and the act of overturning the hot slag, may

have come of the negligence of the plaintiff. Indeed, the evidence points to that conclusion, and the explosion which followed was the natural result, of which plaintiff should have been informed; or, at all events, defendant was under no duty to inform him. This is the argument against the verdict. And certainly, within limits, the law will assume that every one has knowledge of destructive forces in the world and the powers of the earth and air. Of such is the knowledge that comes to every man of sound mind, in the ordinary course of his life, that fire will burn; that water will drown; that one may fall off a precipice; and the like. Recently in this court it was said of one who mounted a push car on a railroad, and went down a steep grade, to his hurt, that, knowing the grade, it was his own folly not to heed the law of gravitation; because it is known to all men of sound mind and of all degrees of intelligence that wheeled vehicles go down hill with increasing speed if left to themselves. And in this case the jury was told that the plaintiff could not have recovered for a burn caused by spilling the slag on himself. But the explosive power of hot slag when cast into water is not within the intelligence of ordinary men. It is doubtful whether many people of education know the force and violence of such an explosion; and, if fully informed, how many of them, when put to service at a smelting furnace, would recall their learning without a suggestion from some source.

What the law will presume as to the knowledge of men in matters of this kind, may, in some instances, be a question of difficulty, and certainly it would not be easy to lay down a general rule on the subject. In the face of the plaintiff's testimony, however, to the effect that he had no knowledge or information of the danger to which he was exposed, it would be manifestly unjust in this instance to hold, as matter of law, that he had notice of it.

After all, it is not so much a question whether the party injured has knowledge of all the facts in his situation, but whether he is aware of the danger that threatens him. What avails it to him that all the facts are known if he cannot make the deduction that peril arises from the relation of the facts? The peril may be a fact in itself of which he should be informed. So, in *Coombs v. New Bedford Cordage Co.* 102 Mass. 573, the machinery which caused the injury was open to view, and probably it was seen by the party injured. But the danger of the position was not explained, as was necessary for the protection of one who had no knowledge of it. In another case in the same court the rule was applied to an adult person who

had full knowledge of all the facts out of which danger arose, but the danger itself was not pointed out to him. *O'Connor v. Adams*, 120 Mass. 427. The correct rule as to defendant's liability was announced at the trial, and as to the damages the amount is not so large as to challenge the attention of the court. To one in plaintiff's situation the sum is considerable, without doubt, but the injury was great and the suffering intense. It is impossible to say the jury acted from prejudice or passion, or that they passed the limits of fair discretion on the evidence.

The motion for a new trial will be denied.

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THE RICHMOND.

(Circuit Court, E. D. Louisiana. June, 1881.)

1. RECUSATION.

It is not a good cause of challenge that a judge has formerly been of counsel for one of the parties in a different cause.

BILLINGS, D. J. A motion has been made that I should decline to sit in this cause because I have been of counsel. The doctrine of recusation of judges is of continental origin. According to the law of Great Britain it has been unknown since before Blackstone's time. According to the law which prevails upon the continent, and as declared in the Code of France, a judge is recusable if he has given counsel, pleaded, or written of the controversy, has previously acted as judge or arbitrator, or defrayed the expenses of the suit, deposed as a witness, etc. But at the common law as it prevailed in England, and was adopted by the people of the United States, there could be no challenge or recusation of judges on the ground that the judge had been of counsel. See Coke, Litt. 294; 2 Bro. Civ. & Adm. Law, 369; 3 Bl. Com. 361; *Lyon v. State Bank*, 1 Stewart, 442.

This leaves nothing to be considered except the United States statutes. Of these there are two. The first, which is found in the Revised Statutes, § 601, applies only to causes pending in the district courts. The last, found in the Revised Statutes, § 615, authorizes and requires the court, on the application of either party, to transfer a cause to another circuit court. There could be no pretext that the first statute applied. It would dispose of the second statute to say that this is not an application to transfer to another court. In *Spencer v. Lapsley*, 20 How. 266, it is settled that the inability was to be

disclosed on the record, upon motion of one of the parties, and that a judge interested might make the order of removal.

It is clear that, except upon motion to remove, the machinery provided by the statute could not be set in operation, even in a cause included in its scope.

But does this cause fall within this statute, even had this application been a motion to remove? The ground suggested is that the judge has been of counsel. The language of the statute is, has "been of counsel for either party." In this case the judge had been one of the parties in a suit in law for damages by collision. In that suit an appeal bond had been given, and the pending proceeding is to fix the liability of the sureties on the appeal bond. It would seem that the controversy or cause here, though growing or issuing out of the cause in which there was a judgment, is distinct. It presents a different question, and is against a party not an actor in the other suit. In the *Bank of North America*, 2 Bin. 454, it was held that it was no objection to a judge that while at the bar he had been consulted and had given an opinion in favor of one of the parties. In *Blackburn v. Craufurd*, 22 Md. 447, it is held: The fact that a judge had been counsel in a case theretofore tried between two of the parties to the bill, which involved some of the issues raised in the bill, did not bring him within the letter or spirit of the constitutional inhibition against sitting in a case wherein he may have been of counsel. To the same effect, see, also, *Taylor v. Williams*, 26 Tex. 583. In *Cook v. Berth*, 102 Mass. 372, a magistrate was held not to be disqualified by a statute similar in terms, and to have properly sat in an action of ejectment, though he had drawn the plaintiff's lease, under and upon which the action was brought, and had written the notice to quit. In *Thellusson v. Rendlesham*, 7 H. of L. Cas. 429, where a court constituted of so many members could with slight inconvenience dispense with the participation in a hearing of one of the peers, Lord St. Leonard stated that he had on two occasions been of counsel in the cause, though not upon a point then pending, but that he "did not conceive that these facts absolved him from the duty of taking part in the hearing." The lord chancellor (Lord Chelmsford) and Lord Brougham concurred in that view, and no member of the house dissented.

The decisions, so far as I have been able to find, are unanimous that "of counsel" means "of counsel for a party in that cause and in that controversy," and if either the cause or controversy is not identical the disqualification does not exist. In the case before me, the controversy in which the judge was of counsel was as to the lia-

bility for a collision. The controversy now pending and being litigated is with reference to the liability of sureties under a mandate remitted from the supreme court. It could not be error for the judge to sit in this matter, nor would the statute exempt him. The rule is, therefore, as a matter of right dismissed. But the consent of the opposed party having been given, an order based upon consent of parties will be entered that the matters now at issue in this cause be restored to their place on the calendar, to be heard by that member of the court who may preside when the same may be moved on for trial.

## H. & C. NEWMAN v. RICHARDSON and others.

### LETCHFORD v. RICHARDSON & CARY.

(Circuit Court, E. D. Louisiana. June, 1881.)

#### 1. PARTNERSHIP—NEGOTIABLE INSTRUMENTS—PURCHASER WITH NOTICE.

Where one of two partners fraudulently indorses the name of the partnership upon commercial paper in which it had no property or interest, and obtains money upon it from the indorsee for a purpose clearly outside the scope of the partnership business, the indorsee has no claim against the other of the copartners.

At Law.

*J. Ad. Rozier and V. Z. Rozier*, for Newman.

*T. Gilmore & Sons*, for Letchford.

*Bayne & Renshaw and J. A. Campbell*, for defendant.

BILLINGS, D. J. The facts in the first case are as follows:

George W. Cary, one of the firm of Richardson & Cary, applies to the plaintiffs for a loan or advance on cotton thereafter to be shipped by his brother, C. W. Cary, of Monticello, Alabama. The plaintiffs demand collateral security. The next morning George W. Cary delivered to them as such collateral security the promissory note upon which suit is brought, which is a note purporting to be made by C. W. Cary, to the order of Richardson & Cary, and was indorsed by George W. Cary in the name of the firm. As a matter of fact, the note was never the property of the firm of Richardson & Cary, and they never had any interest in it, nor had they any interest in the transaction in which the loan or advance was made to G. W. Cary.

In the case of W. H. Letchford against the same party the facts are as follows:

George W. Cary, one of the firm of Richardson & Cary, applied to the plaintiff for a loan of \$1,000, to meet a draft that was drawn to make some settle-

ment of the debts of the old house of Wallace & Cary, and upon making the loan the plaintiff received the promissory note upon which suit is brought, which is a note purporting to be drawn by S. Mims, Jr., to the order of Richardson & Cary, and was indorsed by George W. Cary in the name of the firm. Mims was not even a customer of defendant's firm, and they were under no obligation to pay the debts of Wallace & Cary, and had no interest either in the paper delivered to plaintiff nor in the loan to George W. Cary.

These cases are identical in principle. In both cases one partner fraudulently indorses the name of the partnership upon commercial paper, in which the partnership had no property or interest, and obtains money upon it from the plaintiff, for a purpose manifestly not a partnership purpose. The doctrine upon which partners are held for the action of each other is the doctrine of agency. Authority is implied whenever the act done is within the scope of the partnership business, or is, according to outward circumstances, the act of the partnership. But when the act done is beyond the scope of the partnership business, or is admitted not to be the act of the firm, then a special authority from the other partners, either expressed or implied, must be shown in order to bind them so far as first parties are concerned. These loans were both made for a purpose, not a partnership one. In the one case it was a loan to the brother of George W. Cary, and in the other, a loan for the purpose of paying a debt of another firm.

But it is urged that when one of two innocent parties must suffer, that party who has held out to the other a third party as having an authority he did not possess, must bear the burden or loss. This is true. But the limit of the application is reached when the purpose or object of the act done is unquestionably not that of the firm. The reason of the limitation is that when a partner attempts to use the firm name for a purpose admitted to be outside of a partnership transaction, the party with whom he deals is fairly affected with notice, and put upon his guard, and, if he fails to make suitable inquiry, occupies in law the same attitude as does any other person who deals with an agent whom he knew, or ought to have known, was exceeding his authority. The laws upon the subject are well nigh innumerable, but the American authorities, with great unanimity, establish the doctrine that, so far as first parties are concerned, the firm name cannot be used by one member for a purpose confessedly distinct from the firm's business, so as to bind the other members, without showing special power.

Judgment must therefore be given in favor of the defendant Richardson and against the defendant Cary.



## TUCKER v. DUNCAN.

(Circuit Court, S. D. Mississippi. November Term, 1881.)

1. RAILROAD CROSSINGS—RECIPROCAL DUTIES OF TRAVELERS AND THE RAILROAD COMPANY.

When a crossing is dangerous, the duty is imposed upon those engaged in conducting the engine and trains upon the road, and also upon those desiring to make the crossing, to use every reasonable precaution to avoid a collision; and the necessity is increased in proportion to the danger. This duty is required equally of both parties.

2. SAME—DUTY OF TRAVELER.

Where one attempts to drive his team over a railroad crossing on a level with the highway with knowledge of its dangerous condition; that a warehouse formed an obstruction to the sight and sound of a train coming from one direction; that it was the time for making up a train and that the locomotive must pass the crossing to do so—he must both look and listen for the approach of the locomotive, and, if need be, stop for that purpose.

3. RAILROAD EMPLOYEES.

Railroad employes are as worthy of belief as other agents.

At Law.

*Humphries & Sykes and Wiley P. Harris*, for petitioner.

*E. L. Russell, Peter Hamilton, J. M. Allen and L. Brame*, for defendant.

HILL, D. J. This is a complaint made by the said Tucker, in which he alleges that on the eleventh day of October, 1880, he was with his wagon, drawn by one horse, crossing the Columbus branch of the Mobile & Ohio Railroad, on St. John street, in the city of Columbus, when, without any carelessness or default upon his part, but by the carelessness and improper conduct alone of the employes operating the engine and train of said receiver, upon said railroad, his wagon was run against and thrown over, by means of which he was thrown from his wagon and received sundry dangerous and severe wounds, endangering his life, greatly disfiguring him, and causing him great bodily pain, for which he claims \$25,000 damages as compensation. To the complaint the defendant answers that the injuries complained of were caused by the carelessness and reckless conduct of the petitioner alone, and not by the carelessness or want of skill or misconduct upon the part of his employes, as alleged in the petition. Upon the issue thus made a large volume of evidence has been taken and submitted to the court, upon which exhaustive comment has been made by the distinguished counsel on both sides, all of which has been carefully considered, with the sole view of arriving at a correct conclusion as to whether or not, under the testimony

and rules of law applicable to it, the petitioner is entitled to compensation, and if so, for what sum. The proofs show the following indisputable facts:

The point at which the accident occurred is at the crossing of St. John street over the railroad in charge of the defendant as receiver, under the appointment of the court, and in the city of Columbus; and it is a dangerous one for those passing on this street going south, from the fact that it is near the depot, and near the side track used for switching off cars and making up trains, and over which point locomotives and trains necessarily have to pass many times during the day. The danger is further increased from the fact that there is a brick warehouse situated east of the street and north of the railroad, and extending 250 feet from near the track of the road north on the street, and 240 feet east of the street; and, being some 17 feet high, obstructs the view from those passing south on the street. The danger is still further increased by the narrowness of the street near the crossing, being only 15 or 16 feet wide, with a deep and wide ditch or washout on the west side. The street is also covered with gravel, which causes a noise when vehicles pass over it. The depot, side track, and switches used by the railroad are situated east of and near this crossing, and in making up trains the locomotives must necessarily pass it. The time for the departure of the evening train was 40 minutes after 3 p. m., and the practice was to commence making up the train an hour or more before the train time, and at the time of the occurrence complained of the locomotive was employed in making up the evening train, being about 3 o'clock p. m. It is also an indisputable fact that petitioner was driving a spring wagon loaded with rails and drawn by one horse, coming down St. John street, going south; that when near the crossing, and at a place where the street was too narrow to turn around, the locomotive approached the crossing, the horse became frightened and stopped for a moment, when petitioner urged him on with the purpose of passing in front of the locomotive; that the fore wheels of the wagon passed the end of the pilot of the engine, but that the hind wheels, or one of them, was caught on or struck the end of the pilot, which threw the wagon on its side. The horse being frightened sprang forward and disengaged himself from the wagon. The petitioner was thrown forward upon the street and was thereby greatly wounded, injured, and disfigured, causing him great pain and suffering, and which injuries may prove permanent. There was not then, and never had been, any sign-board erected at that point warning passers of approaching

trains, nor any other warnings or signals given other than the ringing of the bell or blowing of the whistle. These are all of the undisputed facts that need be stated. There are others, and upon which the questions submitted must greatly depend, about which there is more or less conflict between the witnesses of petitioner and defendant.

The conductor of the train, the engineer who was operating the engine, the brakeman who was then employed in changing the switch or throw-rail, the fireman then engaged on the locomotive and whose business it was to ring the bell, also another witness, all testify that at the time the collision took place, and before, while the locomotive was in motion, the bell was ringing. It is also in proof that soon after the accident the petitioner stated that the bell was ringing. The petitioner has introduced the testimony of a number of witnesses, stating that they were near enough to have heard the bell if it had been ringing; some speak in more positive terms that it was not rung; and others, that if it was that they did not hear it. Other witnesses state that it was the general practice to ring the bell when the engine was in motion, but that it was sometimes omitted; some witnesses stating that the omission was frequent, and others that it was not. It is also in proof that accidents have occurred at this crossing before, or were barely escaped. It was the duty of the conductor and of the engineer to see that the bell was rung, and it is to be presumed that the brakeman would also observe this duty; it was also the duty of the fireman to ring it. All these swear positively that it was rung.

The testimony on the other side is, with one or two exceptions, of a negative character, and those stating most positively do not state reasons for remembering that they were listening, and that the bell was not ringing; and then the declaration of the petitioner himself to his physician when attending to his wound immediately after the accident, explaining how it occurred—that the bell did ring—in my judgment gives a decided preponderance in favor of the proposition that the bell was rung. I cannot assent to the position that the employes of a railroad are less worthy of belief than other agents. All agents and employes are presumed to be friendly to their employer, and on that account are usually subjected to a rigid cross-examination; but when this is done, their evidence must be weighed as other testimony, and its value estimated in connection with all the acts proven.

It is contended by petitioner's counsel that no weight should be given to petitioner's declaration made in the presence of the engineer, as testified to by him, as to the ringing of the bell, because of the want of credibility of the witness, the unreasonableness of his statement,

and the suffering condition of the petitioner. I am of opinion that the statement of the witness is not unreasonable. He was but a short distance from him, and immediately sprang to him, and most probably made the inquiry before he was aware of the extent of the injury, and the answer was made when the facts were present before the mind of the petitioner.

The most satisfactory conclusions as to the real occurrences immediately preceding and at the time of the collision are to be drawn from the statement made in evidence by the petitioner himself, and his declaration made soon after to Dr. Vaughn and the physical facts attending it, as shown by the evidence and uncontroverted. The petitioner, in his deposition, in reply to the question as to how the injury complained of was occasioned, made the following answer: "As I got near the railroad crossing my horse became very much frightened at seeing the locomotive approaching, and I pulled the reins to stop him, but he was so excited I failed, or could not stop him. I said 'whoa' to him twice. He did not stop at all. The engine was then immediately in front of him. I then became wonderfully excited myself to see how I could escape myself. The street was too narrow; I could not turn round. I saw the horse was determined to go forward, and, believing it was the only chance to save my life was to let him go, I slackened the rein and he darted violently forward. The cow-catcher, to the best of my knowledge, struck the wagon at the hind wheels and threw me 12 or 15 feet forward on the street. I was knocked senseless, and do not know anything more about the particulars."

Dr. Vaughn testifies—

"That soon after the collision he was called to dress the petitioner's wounds, when he asked the petitioner as to the manner of their infliction. He replied that he had been run over by a locomotive at the crossing at St. John street and thrown into the ditch near by; that the rear of the wagon had been struck by the locomotive; that, hearing the bell and the locomotive coming, he tried to stop his horse; that the more he pulled the faster the horse went. Finding that he could not stop him, he tried to cross the track by driving him up, with the result as stated."

James Sykes testifies—

"That after the accident petitioner stated to him that he was driving his wagon, not thinking of the engine or cars until he approached near the corner of the warehouse; that he heard no bell is what I think he said, or, as I now recollect, he said he heard no noise; that the engine came suddenly by, or came in sight or view of his horse, who became very much frightened, and he gave him a cut with a whip to make him jump across the road ahead of the engine, which he thought was his only safety."

The undisputed physical facts are that the horse and fore wheels of the wagon had passed in front of the engine before any collision took place, and that either the end of the pilot ran into the hind wheels of the wagon, or by a sudden turn of the wagon to the left the hind wheels of the wagon ran upon the end of the pilot. From the rapidity with which the wagon must have been moving, and the slow motion of the engine at the time, I am of the opinion that the wagon ran on the pilot. The testimony of the engineer is that when he saw the petitioner he reversed the engine and put on the steam to stop it; he was scarcely moving the engine when the collision took place. This statement is sustained from the fact that the horse and fore wheels of the wagon passed in front of the engine before the collision took place, which could not have been done had the engine been moving at any but the slowest speed.

This is a sufficient statement of the facts as shown from the proof, with this addition, that the petitioner was well acquainted with the danger of the crossing, and the time of the making up and leaving of the trains. There is little difference of opinion as to the rules of law properly applicable to the facts as stated. See *Railroad Co. v. Houston*, 95 U. S. 697; *Tilfer v. Railroad Co.* 1 Brown, (N. J.) 188.

The petitioner, to entitle himself to compensation, must show—*First*, that the collision occurred without any negligence, carelessness, or wrongful act on his part; and, *second*, that it was the result of the carelessness, negligence, or some wrongful act upon the part of the employes of the defendant, or of the defendant himself. If it was from inevitable accident brought about by the unmanageable conduct of the horse, or otherwise, not attributable to the defendant or his employes, then no compensation can be allowed. These rules are so plain and so well understood that reference to the authorities to sustain them is unnecessary.

When a crossing is dangerous, the duty is imposed upon those engaged in conducting the engine and trains upon the road, and also upon those desiring to make the crossing, to use every reasonable precaution to avoid a collision; and the necessity is increased in proportion to the danger. This duty is required equally of both parties. It is the duty of those conducting the train to give a signal by having the bell rung, or blowing the whistle, when approaching a crossing, to warn passers of the approach of the engine or train, and to look and ascertain whether or not any one is about to cross the track in front of the locomotive, and if so, to slacken up the speed; and, if need be, and if in the power of those in charge of the train, to stop

the train, in order to avoid a collision. See *Cont. Imp. Co. v. Stead*, 95 U. S. 161.

This is the duty on one side, and upon the other it is the duty of those desiring to make the crossing to use their powers of hearing and of vision to ascertain whether or not there is likely to be a passing locomotive or train, and if so, to stop until the danger is past. If there is no obstruction to either the sound or vision, then the passer need not stop, but must use both these faculties; but if there is such obstruction then it is his duty to stop and both look and listen; and if he neglects to use these precautions and a collision takes place, compensation cannot be given, unless it was caused by gross negligence or wrongful conduct of the employes conducting the railroad operations; the general rule being that if the injured party contributes to bringing about the injury he cannot recover, although the employes may not be wholly blameless.

The petitioner knew the dangerous condition of the crossing; that the warehouse formed an obstruction to the sight and sound of the locomotive coming from the east; and also knew, or had reason to know, that it was the time for making up the train. It was therefore his duty, before attempting to cross the track, to both look and listen for the approach of the locomotive, and, if need be, to stop for that purpose. See *Pennsylvania R. Co. v. Beale*, 73 Pa. St. 504; *Allyn v. Boston, etc., R. Co.* 105 Mass. 77.

According to the admission of the petitioner, this he neglected to do until his horse was frightened by the approach of the locomotive. Had the horse not become frightened, he was a sufficient distance from the locomotive to have stopped him and waited for it to pass or get out of the way. Whether the fright of the petitioner caused him not to control his horse, or that the horse could not be controlled, the fact is that it was not done, and he urged him forward before the engine with the hope of escape, and the collision ensued. This calamity to the petitioner is certainly very much to be regretted, both on his account and those dependent upon him, but one which is difficult from the evidence to attribute to the defendant or his employes. See *New Orleans, etc., R. Co. v. Mitchell*, 52 Miss. 808. The proof is that the horse was unusually gentle and used to crossing at that point, yet the proof is equally clear that on this occasion he became frightened without more than usual cause. Certainly this could not be apprehended by the engineer; he had a right to presume that the petitioner would stop until the danger was past, and could not reasonably suppose that the petitioner would run the hazard of attempting to cross in front of

the locomotive. The testimony of the engineer, supported by the physical facts referred to, show that the engine was nearly at a standstill when the collision took place. The engineer could have done nothing more than he did. A careful consideration of the testimony satisfies me that the petitioner did not exercise the caution demanded of him, and that this cause, and his own alarm and reckless attempt to pass in front of the engine, with the fright and action of the horse, caused the collision, without fault upon the part of the defendant or of his employees. Wherefore, under the rules stated, compensation must be refused.

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MARSH v. UNION PACIFIC RY. Co.

(Circuit Court, D. Colorado. January 11, 1882.)

**1. COMMON CARRIERS—LIENS FOR FREIGHT—TROVER.**

When goods are sent, not according to the contract with the owner, but by some other route, there is no lien for freight money; and if the goods are with held under a claim of lien, an action of trover will lie for their value.

**2. TROVER—MEASURE OF DAMAGES—WITNESSES.**

Where household goods, more or less used, were transported by railroad to a distant place and there converted, *held*, that the owner was a competent witness to the point of their value, as such goods have no established market price, and the rule that the market value at the place of conversion is the true measure of damages is, therefore, inapplicable.

On Motion for a New Trial.

*J. W. Horner*, for plaintiff.

*Willard Teller*, for defendant.

HALLETT, D. J. The lien of a carrier for freight money on goods transported by him depends on the contract with the owner. Not that it is necessary that the lien should be mentioned in the contract, but there must be a contract for carriage on which it may rest. In the ordinary course of business, goods delivered for carriage are subject to the condition implied by law that the carrier may retain possession of them until his reasonable charges shall be paid. In delivering them to be carried, the owners assent to that condition, although nothing may be said on the subject, and thus it becomes a part of the contract—just as, in the absence of agreement as to price, the law will imply that it shall be reasonable. On this principle it is settled that a wrong-doer cannot confer on the carrier the right to assert a lien against the true owner. And when goods are sent, not according to the contract with the owner, but by some other

route, there is no lien for freight money;—*Fitch v. Newberry*, 1 Doug. (Mich.) 1; *Robinson v. Baker*, 5 Cush. 137; *Stevens v. Boston & Worcester R. R.* 8 Gray, 262;—because the owner cannot be divested of his property without his consent, and to allow a lien on the goods in a matter to which he has not assented, would divest him of his property to the extent of the lien.

To apply the rule to the present case, it is only necessary to say that, in the contract with the Pittsburgh company, plaintiff did not in any way consent to have his goods charged with a lien for carrying them to Denver. It was not an agreement to pay, and that his goods should be held until he should pay, but he did in fact pay the price of carrying the goods, and as to him the contract was fully executed before the goods left Zanesville. Plaintiff paid the price demanded of him, and all that was demanded for carrying the goods, and it would be absurd to say that he assented to a lien on his goods for the same thing—the money which he had already paid.

But it is said that the Pittsburgh company had no authority from defendant to fix the price of carrying the goods in the way that it was done on the schedule published by the Wabash and Missouri Pacific Companies. And so the court ruled at the trial, without referring to defendant's rule that for carrying household goods payment must be made in advance, under which it might be claimed with reason that the company first receiving the goods was defendant's agent to fix the rate and receive the money. This point was not stated to the jury, however, and they were advised that the Pittsburgh company was without authority from defendant to make the contract. The jury was also instructed to find whether the goods were received by defendant at Kansas City with knowledge that a through contract had been made by the Pittsburgh company, and the price paid for carrying them. Of that there was ample evidence in the rule of defendant requiring prepayment on household goods, and the fact that \$85 was paid to defendant by the Wabash company on account of freight money. Some of defendant's witnesses say that the payment by the Wabash company is of no weight, as freight money is often advanced by shippers when a through contract has not been made, and it would be impossible to determine whether the money was paid on a through contract or as an instalment of freight money. This means that money is paid in both ways, and leaves the payment by the Wabash company to stand as affording some evidence of a through contract. Taken in connection with the rule requiring payment in advance on household goods, it was sufficient to warrant the finding that



defendant received the goods with knowledge that a through contract had been made for carrying them to their destination. And if defendant was advised of the terms of the contract before it performed the part assigned to it, there would be force in the suggestion that by such performance the contract was accepted. It is not necessary, however, to go so far, for the fact that a through contract and payment were made, and that defendant had knowledge of it, is enough to defeat the lien. Independently of that circumstance there may be room for debate whether one who has paid the price of carriage can be further charged in respect to the same matter; whether all companies who have a part in the contract and perform that part shall not be regarded as accepting the contract; whether any of the companies in the line of transportation after the first shall be taken to be the agent of the shipper to make a new contract for him, when, by acting for himself he has practically denied the authority of another to act for him. But these are points with which we are not now concerned. The jury have found, upon sufficient evidence, that defendant received the goods with knowledge of the fact that a through contract for carrying them had been made, and that plaintiff had paid for the service, and that, of itself, displaces the lien on which defendant relies.

This is enough to show that the action may be maintained, for trover lies for the value of goods illegally withheld under a claim of lien for freight money. *Adams v. Clark*, 9 Cush. 215.

Objection is made to the plaintiff as a witness to prove the value of the goods, on the ground that he had no knowledge of the market for such goods in Denver. Many cases are cited to the point that the market price in the place of conversion must control; a proposition which cannot be controverted. Whenever it appears that there is anything like an established price in the market, for which the articles in controversy can be replaced, that price will measure the damages for converting such articles. But for household goods, more or less worn, there is no established price, unless it be that at which second-hand goods of the same kind are sold. And although people who discontinue housekeeping may be compelled to accept that price, no one will contend that it is the full value of the goods. The fact that goods in use, if sold at all must be sold at a sacrifice, is too plain for argument, and therefore the price of such goods in market will not be adequate compensation to one who is deprived of his goods by a wrong-doer. Perhaps the best way to arrive at the value of such goods would be to show the price in market of new goods of the same

kind, and then show, as nearly as possible, the extent of depreciation from use. But this course was not open to plaintiff, for the goods were in defendant's possession, probably not in a condition to be examined, and plaintiff was not bound to inquire whether he would be allowed to send witnesses to inspect them. If it is suggested that a dealer, hearing a description of the articles, would be able to fix their value, the answer may be that few persons would be able to give a description which can be understood. The average man would find himself very much embarrassed in any effort to describe furniture and other articles of household use definitely, so as to enable one who never saw them to judge of their value. No one in Colorado knew anything of these goods, and among plaintiff's acquaintances in Zanesville he could not expect to find any one more competent than himself to testify as to their value. On the whole, it would seem that if plaintiff's testimony as to value cannot be accepted, he will be defeated of his right, and that will not be allowed. In the matter of values, as in other matters, the law will give relief, according to the injury, on the best testimony that can be obtained. *Stickney v. Allen*, 10 Gray, 352; *Starkey v. Kelley*, 50 N. Y. 676.

On the other hand, defendant, being in possession of the goods, was in a position to prove their value in a manner which would dispel all doubts. It attempted to do this, but the evidence is not very satisfactory. The goods were not in a condition to be examined with care, and defendant's witnesses did not give the attention necessary to correctly estimate their value. Evidence of the value in this market of new goods of the same kind, which would have enlightened the jury, was not offered by either party, and if the verdict is wrong the fault is not wholly with the jury. There is, however, some reason to believe that the amount returned is large, and the plaintiff will be required to remit \$500, or submit to a new trial.

The evidence of value offered by defendant was probably entitled to greater weight than was allowed to it, although it cannot be said that it should control. If the plaintiff will remit from the damages the sum of \$500, the verdict may stand, otherwise a new trial will be allowed.

Plaintiff remitted the \$500, and judgment was entered for \$1,500.

## ROBINSON v. NEW YORK CENT. &amp; HUDSON RIVER R. CO.

*(Circuit Court, N. D. New York. January, 1882.)*

## 1. RAILROADS—NEGLIGENCE.

Railroad companies, as carriers of passengers, must apply to the boiler of a locomotive used by them in hauling passenger trains every test recognized as necessary by experts; but they are not liable for defects which cannot be discovered by such tests:

## 2. PRESUMPTIONS—HOW OVERCOME—MOTION FOR A NEW TRIAL.

The testimony of unimpeached witnesses who testify positively to facts which are uncontradicted overcomes a mere presumption; but a verdict will not be set aside on this ground, unless the court is satisfied that the jury were controlled by their prejudices rather than by their impartial judgment.

On Motion for a New Trial.

*E. Countryman*, for plaintiff.

*M. Hale*, for defendant.

WALLACE, D. J. The plaintiff, while upon one of the defendant's cars as a passenger, in June, 1878, was injured by the explosion of the boiler of the defendant's locomotive, which was being used to push the train out of the yard, and brought this action on the ground of negligence to recover for his injuries. Upon the issue of negligence the plaintiff rested his case by proving the explosion. The defendant produced its employes, who testified to the exercise of due care in the management of the boiler at the time of the explosion, and who also testified that the boiler had been recently overhauled, repaired, and tested, and found safe, and that the explosion resulted from a hidden flaw in the iron of the boiler which could not be seen.

The jury were instructed that they might infer negligence upon the theory that the explosion would not have taken place unless the boiler had been in a defective condition, or unless there had been some omission or mismanagement on the part of those in charge of it at the time. They were also instructed that it was incumbent upon the defendant as a passenger carrier to see to it, by every test recognized as necessary by experts, that the boiler was in a safe condition; but that it was not liable for a defect which could not be discovered by such tests.

The first instruction is not criticised. It is elementary that in action for negligence if the plaintiff proves he has been injured by an act of the defendant, of such a nature that in similar cases, where due care has been taken, no injury is known to ensue, he raises a presumption against the defendant which the latter must rebut.

The other instructions were strictly correct. The jury were not told that the defendant was required to adopt every test known to experts to ascertain the safe condition of the boiler.

If this instruction had been given, within some of the authorities it would not have been erroneous. It has been frequently declared that the carrier of passengers contracts for their safety as far as human care and foresight can go, (*Stokes v. Satonstall*, 13 Pet. 181; *Pa. R. Co. v. Roy*, 102 U. S. 451,) and must adopt all the precautions which have been practically tested and are known to be of value, and employ all the skill which is possessed by men whose services it is practicable for the carrier to secure. *Smith v. N. Y. & H. R. R. Co.* 19 N. Y. 127. But the instruction was that the defendant was not exculpated if the defect could have been discovered by the application of all tests recognized by experts as necessary. It surely would not express the true extent of the carrier's liability to say that the carrier is exonerated if the defect could not be discovered by the application of some of the tests which experts recognize as necessary. If there was any test recognized as necessary which was not applied, the carrier failed to comply with its obligation. Of course it was not the suggestion of the instruction that it is the duty of the carrier to adopt all such speculative and theoretical precautions as might be thought necessary by experts, and the instructions are not impugned upon this ground. The precautions referred to were those recognized as necessary by men of practical experience in the testing of steam-boilers.

The more doubtful question presented by the motion for a new trial is whether the jury were justified in disregarding the evidence given by the defendant to overthrow the presumption established by the fact of the explosion. It is, doubtless, the general rule that where unimpeached witnesses testify distinctly and positively to facts which are uncontradicted, their testimony suffices to overcome a mere presumption. But when, as here, the testimony proceeds from persons who would be guilty of a criminal fault unless they vindicated themselves from the presumption arising from the transaction, a question of credibility is presented to the jury. *Elwood v. W. U. Tel. Co.* 45 N. Y. 549. The court might not feel concluded by this consideration on a motion for a new trial, but it would not feel at liberty to set aside the verdict, unless so clearly convinced that the witnesses were entitled to full credit as to be satisfied that the jury were controlled by their prejudices rather than by their impartial judg-

ment. This is not such a case. Although the witness who tested the boiler claimed to have made an adequate and thorough test, when it appeared that this consisted simply in firing up the engine, when the repairs on the boiler were made, until the gauge indicated the steam pressure obtained in ordinary use, a fair inference arose adverse to the theory of a very careful experiment.

The motion for a new trial is denied.

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HUDSON v. KANSAS PACIFIC RY. Co.

(Circuit Court, D. Colorado. January, 1882.)

1. RAILROADS—COUPON TICKETS—RIGHTS OF HOLDERS.

Where a railroad company issues a ticket entitling the holder to a passage over its own and connecting lines to the place of destination mentioned in the ticket, and there is no limitation in it upon the right of the holder to transfer it to another, *held*, that upon the refusal of a connecting line to accept the ticket, and of the contracting company to furnish a local ticket over that line or the amount of money necessary to procure one, the holder has a right of action against the original contracting company for breach of contract; and this right is assignable, under the laws of the state of Colorado, so as to give a right of action to the assignee.

2. VERDICT—DEFECTS IN PLEADING CURED BY.

It is too late after verdict to object that the assignee alleged that he purchased such ticket, when the proof shows that it was bought by others, or that he failed to allege a failure on the part of the contracting company to redeem the ticket.

On Motion for a New Trial.

*J. F. Welborn*, for plaintiff.

*Willard Teller* and *J. P. Usher*, for defendant.

HALLETT, D. J. Plaintiff alleged that he purchased at St. Louis and at Kansas City, Missouri, in the year 1879, of defendant's agents, certain passenger tickets over the lines of the Denver & Rio Grande Railway, in this state, paying therefor the prices named in the complaint, and that the tickets were, and are, worthless, as the Rio Grande Company refuse to recognize them. At the trial it appeared that the tickets were issued by eastern companies having lines extending to Kansas City, not to the plaintiff, as alleged, but to travelers in the regular course of business. When issued, they provided for passage over the line of the company by which they were issued to Kansas City, and from that place to Denver, over defendant's line, and from Denver to destination, over the lines of the Rio Grande Company. Coupons were attached applicable to the several

parts of the route, and as the Rio Grande Company was to complete the contract, its coupon was the last of the series, and connected with the general provisions constituting the contract. All of them were in substance like those issued by the Missouri Pacific Railway Company, in the following form :

MISSOURI PACIFIC RAILWAY.		FORM 307.
This Ticket entitles the holder to one First-Class Passage		Issued by <b>MISSOURI PACIFIC RAIL- WAY COMPANY.</b> Denver & Rio Grande Ry. One First-Class Passage. Denver to Trinidad. This Check is not good if detached. <b>M P-K P-D &amp; R G.</b> Trinidad, Col.
TO TRINIDAD, COLORADO.		
This Ticket is void unless officially stamped and dated. In selling this Ticket for Passage over other roads, this company acts only as Agent, and assumes no responsibility beyond its own line. This Company assumes no risk on baggage, except for wearing apparel, and limits its responsibility to \$100 in value. All baggage exceeding that value will be at the risk of the owner unless taken by special contract. The checks belonging to this Ticket will be void if detached.		
F. E. FOWLER, FORM 307. <i>Acting Gen'l Passenger Agent.</i>		

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It will be observed that there are no conditions as to the time of performing the journey, or as to the right of the purchaser to transfer the ticket to another. It entitles the holder "to one first-class passage" from the place of departure, which, in this instance, was St. Louis, Missouri, to Trinidad, Colorado.

At its office in Denver, for a month or more, the defendant redeemed tickets similar to these in all respects, paying therefor local rates from Denver to the points named in the tickets. It was not then contended that the right was limited to the original purchaser, but payment was made to the holder, and many of them were presented by the plaintiff himself, who received the money for them. The tickets in suit were bought by plaintiff, who calls himself a "ticket broker," in the expectation that defendant would redeem them as had been done with others of the same class. As to these tickets, defendant's agent at first requested plaintiff to hold them a few days until money should be received for redeeming them, and, after four days, defendant absolutely refused to redeem them. Meantime plaintiff had bought others of the same class, amounting in all to the sum in controversy, and after defendant refused them he bought no more.

As to what may be a fair deduction from this proceeding, concerning defendant's liability, there is not much room for discussion.

That defendant should accept the coupon for travel over its own line implies only that it was sold by its authority. But if that was the limit of authority in the company selling the ticket, why should defendant assume responsibility in respect to the remainder of the journey over the Rio Grande line? As to tickets of this class, defendant not only performed the part assigned to it in the original contract by carrying the passenger from Kansas City to Denver, but also protected the remainder of the ticket by furnishing a local ticket to destination, or paying the money which would procure it. A fair inference from such conduct may be that the ticket was originally sold by its authority. And if sold by defendant's authority, and the Rio Grande Company refused to carry the passenger according to its terms, the defendant was clearly liable to some one for the value of the ticket. It must often happen in the effort to draw travel over its lines which would otherwise go to a rival, that a railroad company will assume the burden of carrying a passenger beyond its own terminus, and in such case there would seem to be nothing in reason or authority to exempt it from liability on its contract.

It is conceded that a railroad company may contract to carry a passenger any distance, provided its own line be a part of the journey. And whether the part owned by the contracting company be the first or the last, or from the middle, must be wholly immaterial. The principle is, that, in promoting its own business, a railroad company may make any contract which it may have capacity to perform in some part, although not the whole, and the exact part, whether great or small, cannot be material.

The objection that a contract for transportation over a railroad is not assignable by a passenger, if correct in principle, does not meet the case. The evidence shows that the Rio Grande Company did not accept the tickets, and it must have been known to defendant, when they were sold, that they would not be honored. The fact that other tickets bought of the Rio Grande Company were given in lieu of them, or that money was paid for them at the option of the holder, admits of no other construction. The truth appears to be that the tickets were not sold to be used on the Rio Grande road according to their terms, and could not be so used. How, then, shall we say that the purchaser was bound to ride in person, when he was not allowed to ride either in person or by another, or in any way. If he has no remedy in damages, it would seem that he is without remedy.

It may be conceded also that a ticket is a receipt for passage money, and not full evidence of the contract to carry, as declared in *Quimby's Case*, 17 N. Y. 306. But it is, nevertheless, in the hands of the passenger, evidence of his right to be on the train, without which he cannot travel. By delivering it to another he may signify his purpose to assign his contract with defendant, and that should be enough.

We have seen that although the tickets were for passage over the Rio Grande road they were not available for that purpose, and the right of the holder to demand of defendant a ticket or money, whatever it was, could be maintained. That it was assignable under our statute, so as to give a right of action to the assignee, would seem to be clear, and the delivery of the ticket, although it should be called a receipt or token, should be evidence of such assignment. Can it be questioned that in delivering the ticket to plaintiff the holder intended to part with his right? If he did so intend the right of action is now in the plaintiff, although the contract as originally made may have contained something more than is expressed in the ticket.

It is also said that the facts appearing in evidence are not set out in the complaint, and the proof varies from the allegation. The plaintiff charges that *he* purchased the tickets of defendant's agents, and the fact appears to be that they were bought by others, of whom plaintiff bought them. He has said nothing in the complaint of the redemption of the tickets by defendant, but relied on the refusal of the Rio Grande company to honor them. Whatever weight this objection would have, if made at the trial, it is believed that it comes too late after verdict. The matter in issue between the parties was the present value of the tickets, as defendant must have understood from the complaint, and no formal objection can now be entertained. The motion for new trial will be denied.

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### CHASE and others v. UNITED STATES.

(Circuit Court, D. Massachusetts. January 31, 1882.)

#### 1. DUTIES ON IMPORTS.

The facts that imported goods were subject to a lower rate of duty than that charged upon them, and that the action of the principal appraiser was irregular, because he did not see the goods, cannot be set up by the importer in an action to recover the difference between the amount paid and that of the final liquidation, where he was notified by the collector of the liquidation of the entries at the higher rate, and did not take an appeal to the secretary of the treasury.

At Law.



*C. L. Woodbury and J. P. Tucker*, for defendants, (plaintiffs in error.)

*Prentiss Cummings*, for plaintiffs, (defendants in error.)

LOWELL, C. J. This action was brought to recover duties alleged to be due upon six importations of jute, made by the defendants, into the port of Boston in 1870. The facts in respect to all the importations were substantially alike. The defendants made due entry of the goods, classifying them as manufactures of jute, and the appraiser certified to the correctness of the classification, and the duties, as estimated, were fully paid, and the goods were withdrawn and sold. Some months afterwards the principal appraiser, Mr. Webster, reported that the goods in question, known as "D. W. Bagging," that is, double-warp bagging,—were suitable for the uses to which cotton bagging is applied, and that they were dutiable at a higher rate than that at which they had been assessed in the estimate. Mr. Webster did not see the goods. The collector thereupon liquidated the entries at the higher rate, of which the defendants were notified; but they did not appeal to the secretary of the treasury. This action is brought to recover the difference between the amount paid and that of the final liquidation.

It was admitted, for the purposes of the argument, if the facts themselves were competent, that the bagging was in law subject to the lower rate of duty; and that the action of the principal appraiser was irregular because he did not see the goods. But the district judge ruled that the defendants could not set up these facts, because they had neglected to appeal to the secretary. He relied on section 14, St. June 30, 1864, (13 St. 214,) as construed in *Westray v. U. S.* 18 Wall. 322; *U. S. v. Cousinery*, 7 Ben. 251; *Watt v. U. S.* 15 Blatchf. 29; *U. S. v. Phelps*, 17 Blatchf. 312. In this last case, Judge Blatchford said that the three preceding authorities had established the law for the circuit courts, and I agree with him. If *Westray v. U. S.* does not mean what Chief Justice Waite and Judge Blatchford understand it to mean, we must rely on the supreme court to set us right.

Judgment affirmed.

## ALBANY CITY NAT. BANK v. MAHER, Receiver, etc.

(Circuit Court, N. D. New York. January, 1882.)

## 1. TAXATION—LAW OF NEW YORK OF 1881, c. 271.

Chapter 271, Laws of New York of 1881, declared to be void on the ground that it is, in effect, a legislative assessment of a tax imposed upon a body of individuals selected out of a general class, without apportionment or equality as between them and the general class, or as between themselves, and without giving them any opportunity to be heard.

Injunction.

*Amasa J. Parker*, for plaintiff.

*R. W. Peckham*, for defendant.

WALLACE, D. J. It was decided, upon the motion for a preliminary injunction herein, that the assessment against the shareholders of the complainant was void, because the assessors did not comply with the provision of the statute intended to afford tax-payers an opportunity for the examination and correction of their assessments, which were a condition precedent to the legality of the assessment. Since that decision an act of the legislature has been passed designed to cure the invalidity of the assessment, and that act is now relied upon as a defence to the action. Chapter 271, Laws 1881. That act declares that the amounts of all assessments attempted to be levied and taxes imposed upon the shareholders in national and state banks in the city of Albany during the year 1880, as the same now appear of record in the assessment roll of the Sixth ward in said city, and now in the hands of the receiver of taxes therein, are hereby assessed and levied upon such shareholders whose names now appear in said assessment roll as assessed upon their bank shares. It further declares that the time limited for any party aggrieved to procure a writ of *certiorari* to review such assessment upon the ground that it is unequal, in that the assessment has been made at a higher proportionate valuation than other property on the same roll by the same officers, and that the petitioner is or will be injured by such alleged unequal assessment, pursuant to chapter 269 of the Laws of 1880, shall not be deemed to have expired until 15 days after the act becomes a law.

With great reluctance this act must be declared in excess of the legislative power. The almost unlimited power of the legislature over taxation has always been acknowledged by the courts, but this act is an unprecedented exercise of that power. It will not be contended that

the legislature can sanction retroactively such proceedings in the assessment of a tax as it could not have sanctioned in advance. This assessment was void because the persons subjected to it were deprived of notice, and thereby lost the opportunity to be relieved in whole or in part from the payment of the tax. The curative act perpetrates the vice which was originally fatal to the assessment. It denies the shareholders the right to be heard. It does indeed permit a review by *certiorari*, but the shareholders are limited to a review upon the single ground that the assessment is at a higher proportionate valuation than other property on the same roll by the same officers. They are not allowed to challenge the assessment upon the ground of overvaluation generally, nor to show that they should have been allowed deductions which the laws of the state allow to other tax-payers, or to show that they were not in fact the owners of the property for which they were assessed. It is, in effect, a legislative assessment of a tax imposed upon a body of individuals selected out of a general class, without apportionment or equality as between them and the general class, or as between themselves, and without giving them any opportunity to be heard. The legislature cannot impose the whole burden of the state or of a single taxing district upon a portion of the property owners of the district. "It is of the very essence of taxation that it be levied with equality and uniformity, and that there should be some system of apportionment." Cooley, Const. Lim. 495. This assessment derives no support from the fact that the tax was originally levied upon all other property holders by a system of apportionment which secured uniformity and equality, because these shareholders were excluded from the benefit of that system and are still excluded. They are singled out and each assessed an arbitrary sum upon the assumption that each is taxable for a given amount of property, and that such sum represents his share of the common burden, while they are denied the right given to all others of obtaining the deductions and corrections allowed by the general system of assessment. As is said in *Stuart v. Palmer*, 74 N. Y. 183: "It matters not upon the question of the constitutionality of such a law that the assessment has, in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be done." *Earl*, J., 188. It may be that the tax assessed against the shareholders of complainant is no more onerous than they were required to bear, but this fact does not affect the question of legislative power and cannot give validity to the act.

Entertaining these views, it is unnecessary to discuss the other objections which have been urged to the original assessment and to the invalidity of the curative act.

As the original assessment was void and has not been validated, there was no necessity for a tender on the part of the shareholders of such sum as might be equitably due on account of their taxes. The cases in which a tender has been required were those when there was an excessive as distinguished from a void assessment. *Nat. Bank v. Kimball*, 103 U. S. 732; *Cummings v. Nat. Bank*, 101 U. S. 153.

It is urged as a reason for denying the relief claimed that the proofs fail to show that the shareholders of complainant have any intention to institute suits against the complainant if it pays the tax or withholds their dividends. It suffices, however, that they have the right to sue the bank. The complainant is placed in a position where it is subjected to the contingency of a multiplicity of suits by the several shareholders on the one hand, if it recognizes the validity of the tax and withholds the dividends, and by the city authorities on the other hand if it refuses to do so.

A decree is ordered restraining defendant from all proceedings to enforce the tax as against the complainant.

### UNITED STATES v. WYNN.\*

(District Court, E. D. Missouri. January 30, 1882.)

1. CONSTITUTIONAL LAW—INFAMOUS CRIMES—ARTICLE 5 OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES CONSTRUED.

No crime is infamous, within the meaning of article 5 of the amendments to the federal constitution, unless expressly made infamous or declared a felony by an act of congress.

2. SAME—SAME—STEALING FROM THE MAIL—PRACTICE—INFORMATION.

Stealing from the mail is not an infamous crime and may be prosecuted by information.

Motion in Arrest of Judgment.

*Drummond & Smith*, for the United States.

*Paul Bakewell* and *G. M. Stewart*, for defendant.

TREAT, D. J. An information was filed against the defendant, under the second clause of section 5469, Rev. St., which section is as follows:

"Any person who shall steal the mail, or shall steal or take from or out of any mail or post-office, etc., any letter or packet; any person who shall take

\*Reported by B. F. Rex, Esq., of the St. Louis bar.

the mail, or any letter or packet therefrom, or from any post-office, etc., with or without the consent of the person having custody thereof, and open, embezzle, or destroy any such mail, letter, or package which shall contain any note, bond, etc.; \* \* \* any person who shall by fraud or deception obtain from any person having custody thereof any such mail, letter, etc., although *not* employed in the postal service, shall be punishable by imprisonment at hard labor for not less than one year and not more than five years."

Under said information the defendant was tried before a jury and found guilty.

The court assigned as counsel for the defendant, Messrs. Bakewell and Stewart, who have assiduously attended to the case, and presented to the court, in the light of authorities and argument, their views of the law which should govern United States courts in this class of vexed and undetermined cases. With equal diligence the counsel for the United States have prosecuted the controversy.

The first question is, what, under the fifth amendment of the United States constitution, is an infamous crime? and the second, whether the offence charged is within that provision. Within a few years past there has been much discussion of the main question, and several decisions by the United States courts, each of which encounters and endeavors to solve, at least to a limited extent, the many and important difficulties involved. They are too numerous for detailed analysis or review. Many of them fully consider what at common law were infamous crimes, and proceed on the theory that if a like offence exists under United States statutes, it must be considered "infamous" under the federal statutes. Hence, the elaborate review in such cases of the common law, and British statutes existing at the date of the United States constitution, and original amendments thereto. Counsel in this case have in the most praiseworthy manner presented the whole line of English decisions and authority on this subject, which, if conclusive or persuasive, would have an essential bearing on the question.

At the date of the United States constitution there were no federal offences except, impliedly, treason. The fifth amendment refers to "capital offences and other infamous crimes." Were those offences which at that time were capital or infamous at common law to be considered as within the purview of that amendment, if thereafter congress chose to specify offences against the United States, and did not denounce capital or infamous punishment on conviction thereof? Of the many offences at common law, and by British statutes, which were capital, very few were even made federal offences or punishable

capitally. Hence, in this particular, it must be conceded that there was not embraced in the purview of the constitution any offences denominated "capital" except those which might thereafter be so declared by congressional enactment. If this be so, why should a different rule obtain as to the so-called "infamous crimes" designated in the same amendment? The rule governing the two should be the same.

If regard is had to the then existing common law and British statutes, as fully explained in the cases cited, it may be considered as settled that the treason, felony, and *crimen falsi* were infamous. To every student of legal history it is well known that many offences now considered trivial, comparatively, were in England denominated felonies, and once made capital, while many other and graver crimes were designated misdemeanors, and followed by milder punishments. As at the date of the constitutional amendments it remained for congress to name offences and prescribe punishments therefor, is it to be held that every offence by it defined must take either its classification or punishment *ex necessitate* from the English system, or solely from congressional provisions?

Originally a felony was an offence which was followed by forfeiture, yet a century ago the English courts repudiated that test, and so have the American courts since. It is said that it is not the grade of the punishment, but the nature and quality of the offence, which must determine its classification. If so the rule is very uncertain. Many offences comparatively trivial were felonies, and punishable at common law with death and forfeiture, which at the present time are not felonies or so punishable either in England or the United States. It must be observed that the constitutional amendment under review does not use the word "felony." True, at common law all felonies were infamous, but as the constitution did not adopt the penal code of the common law, and as consequently there are no common-law crimes against the United States, how does it happen that whatever was in common law a felony comes to be infamous when an offence of a like nature is declared to be an offence—but not a felony or infamous—against the United States, punishable only as the latter had enacted.

Although forfeitures ceased to be the consequence of most felonies before the adoption of the United States constitution, yet the designation "felony" remained. Still, are we to hold that all felonies under the United States constitution and statutes are to be held infamous, notwithstanding their position before the law had been essentially

changed? Section 5326, Rev. St., declares that "no conviction or judgment shall work corruption of blood or any forfeiture of estate." Again, under the head of *crimen falsi*, offences were infamous which were followed with disqualification, as witnesses or jurors. Many offences which, under the English system, involved such consequences do not do so now under many American codes, and especially under the federal laws. So far as observation goes there are but two offences expressly denounced by federal statutes as infamous within the meaning of the common-law definition, yet there are disqualifications for offices in a few others.

Shall all offences, then, involving moral turpitude, be held technically infamous? What shall be the test, the punishment, or the quality of the act? Most modern jurists agree that the nature of the punishment is not the criterion, and yet many of them attempt to draw a sharp distinction at the walls of the penitentiary. If the nature of the punishment does not affect the question, why is it that they make imprisonment in the penitentiary infamous and not imprisonment in the common jail? All familiar with federal statutes and practice know that persons convicted can, in many instances, be sentenced to imprisonment, with or without hard labor, either in a jail or penitentiary.

It is very difficult to reconcile the cases, or to reach a definite conclusion therefrom. In this circuit it has lately been held that the punishment does not give character to the offence, although the later decisions are not in accord with what theretofore had been held otherwise. If the extent or place of punishment does not affect the question, how is it that the walls of the penitentiary can make a dividing line between infamous and non-infamous crimes? It must be confessed that the rulings of this circuit for more than 20 years on this subject were overthrown by the *Maxwell* and other cases, and properly so. Hence, the test is not where the criminal may be imprisoned, nor what at common law would have been the designation of the offence, but what the federal statute prescribes. It is very difficult to understand logically what rule should be observed, in the light of many decisions. Shall the courts pronounce that every felony is infamous, merely because the United States statute denominates a specific offence a felony, when no such offence was known to the common law, and consequently could not be infamous when the constitution was adopted? On the other hand, if congress prescribes an offence and does not denominate it a felony, and yet the very nature of the offence is one of moral turpitude, but the punishment not in-

famous, can the court say it is infamous, to be pursued only through indictments?

It will be seen that great embarrassments exist, which have perplexed the courts, arising not from the constitutional provision alone, but from United States statutes.

Only two offences have denominated expressly against them disqualifications which are within the technical definition infamous, unless all felonies are to be so considered, and certain offences under the election laws pertaining to disqualifications for office. It may be very difficult to reconcile cases with right reason on this subject, and such an effort will be foreborne. Without criticising such cases, and analyzing them it may be wiser to state generally the conclusions reached, and to give the elemental thoughts on which such conclusions rest.

As at the date of the constitution there were no offences under the federal law, with the possible exceptions named, is not the character of each offence thereafter prescribed to be determined solely by the statute? Within recognized rules a felony is infamous, and in the absence of such a designation the offence is not a felony. Hence, if an offence against the United States is defined, and the same is not denominated a felony, and no infamous punishment is denounced, how can a court decide that offence to be without the constitutional provision? Was it the purpose of the constitution to make all offences that congress might thereafter prescribe, to take their quality, not from congressional legislation, but from the common law? If so, was not the power of congress restricted as to offences not known to the common law? So far as their penal consequences might extend,—that is, if congress enacted that certain defined acts should be an offence against the United States, and attached thereto consequences which were infamous,—were they not to be so, although there was no common-law rule on the subject? In other words, could not congress declare what offences it enacted infamous or non-infamous, as it may deem wise?

This suggestion leads up to the main inquiry whether congress was inhibited from making any offence a felony or infamous which the common law or British statutes did not recognize as such. The mere statement of the proposition shows its absurdity, for none of the common-law or statutory offences (British) were United States offences. Whatever congress might enact thereafter would take its character, quality, and punishment solely from the congressional enactment. Although courts would look for the definition of terms



used, if they were common-law terms, to the common law, yet they could not enlarge the punishment beyond what the federal statutes prescribe. Similar offences may have been capital under the British law. Yet congress may have denounced therefor imprisonment merely for a limited term, or merely a fine. How, then, is the offence to be designated,—according to the federal statutes, which must alone govern, or according to the common law, which is no part of the federal system?

Without pursuing further this abstract line of thought, which leads to a *reductio ad absurdum*, it may be well to state succinctly the views of this court. At the adoption of the United States constitution, and the amendments thereto, inasmuch as no federal offences had been defined, it was prescribed that whenever congress should declare certain acts an offence, and attach thereto capital punishments or infamy, the alleged offender should not be brought to trial except after indictment.

The nature, functions, and protective duties of a grand jury have been often defined and enforced by this court. But the question under consideration is, when is the interposition of such a jury essential? It may be stated that the following rules should prevail:

(1) In the absence of a federal statute there is no offence cognizable by United States courts.

(2) When congress has declared an offence, it is what congress has designated it, and not what any other system of jurisprudence or foreign statutes may prescribe.

(3) If the congressional statute prescribes infamy the offence is infamous.

(4) If congress does, without express provisions as to infamy, make the offence a felony the offence must be prosecuted as infamous and by indictment.

Under this head it must be observed that common-law felonies, or offences of like nature, are not within the purview of the constitution unless congress so enacts. The many offences under the British law, with their barbarous consequences, were not, and in some instances (notably, treason) could not be, federal law. By recognized decisions and definitions all felonies were infamous, but as there were no felonies here until congress so enacted, whatever offences congress denounced, not as felonies, but as misdemeanors, could not fall within the description of infamous unless, independent of the technical definition of "felony," they fell within the rule of infamous punishments, so expressly denounced; or, possibly, from the quality or nature of

the offence, as *crimen falsi*. As to the latter, this court holds that the federal statute must alone prevail.

(5) If there are no felonies under the federal law except what the federal statutes so denominate, what other federal offences are infamous? As has been already stated, there are only two statutes which denounce infamous punishment; that is, disqualification within common-law rules. Considering the nature of the United States government and its limitations of authority, what offences and consequences thereof can obtain within its jurisdiction beyond what congress enacts? It cannot borrow authority from England or from any of the states within the Union. It may be that British statutes or law and state statutes measure certain offences against their authority very differently from federal statutes; may denounce against them punishments of infamy or otherwise, while the federal statutes treat like offences as trivial. United States courts are bound to follow United States statutes, and no other, in criminal cases.

It has been urged with force that as United States courts are bound as to rules of evidence in civil cases to follow the state authority, that, therefore, if certain offences under state laws are made infamous the United States courts should consider infamous cases of like quality as to turpitude under the federal law. But is not this a begging of the question? The diversity or incongruity of federal legislation in that respect need not be discussed, whereby what is a rule of evidence in one United States court may not be the rule in another, and whereby United States courts are not governed by a uniform law enacted by congress, but are made subject to local legislation, contrary to the spirit of federal jurisdiction and authority. It must suffice, however, that no state legislation can enlarge or restrict federal authority, nor can such legislation create or qualify a federal offence. Each state may, for purposes of its own, designate what shall be considered offences against its authority, and characterize them as felonies or otherwise; but its legislation in such respects cannot override federal laws, or supply their supposed defects, in matters exclusively within federal cognizance; hence, United States courts cannot look to state legislation for assistance. If, then, congress passes a statute against frauds of various kinds, which, under the common law, would fall respectively under the designation of infamous or non-infamous, should a United States court fall back on the common law to ascertain the nature and quality of this newly-created offence, and attach consequences which congress has not done? These questions have generally been discussed as if whatever offence congress declared was

to be considered, not as what congress enacted, but as what like offences by analogy were considered at common law or by state statutes. At this point the logical difficulty occurs. If congress alone can say what shall be an offence under the United States laws and prescribe the punishment therefor, how can the courts go beyond such congressional enactments? What, then, independent of felonies, shall be considered in the United States courts infamous crimes, within the meaning of the fifth amendment of the constitution? The answer should be, such offences and such only as congress has declared to be infamous. Whence does a United States court derive authority in criminal cases to go beyond the United States statutes? Hence cases not declared felonies or infamous can be prosecuted by information. It is true that congress in its wisdom has chosen to denominate many trivial offences, involving no moral turpitude, felonies, and not so to denominate many of the gravest crimes; yet the courts are bound thereby. In these, as in many other matters, courts can only say: *Sic ita lex scripta est.*

After a careful examination of the many authorities cited, English and American, it seems that the true solution of the vexed question must be found in the fact that there are no federal offences except such as congress prescribes, and that if congress declares an offence capital or infamous, the accused has a right to exact the intervention of a grand jury. This rule is to be taken with the qualification that all declared felonies are to be construed infamous. If congress does not choose to declare an offence a felony, or make it infamous, it cannot be so considered in a United States court.

These views may not be in accord with those expressed by some courts, and especially by those who decide that the quality or character of the offence is or is not to be determined by the punishment. After felonies under the British law had been specifically defined as determinable solely by the consequent punishment, the English courts adopted another rule, which has been generally followed in this country, whereby the nature of the punishment was held not to determine the character of the offence. Still the struggle remains under federal statutes whether, in the absence of a designation of the offence as a felony or misdemeanor, the court should look to the prescribed punishment to ascertain the true classification. Many acts of congress prescribe hard labor or imprisonment in the penitentiary, with or without hard labor for a defined term, or imprisonment solely, or fine and imprisonment, etc., in most instances leav-

ing the place of the imprisonment in the discretion of the court. Is it, then, to be held as a legal proposition that imprisonment in the penitentiary, which is often at the discretion of the court, makes the offence infamous, whereas if, in its discretion, the imprisonment were ordered to be in the common jail it would be non-infamous? Again, if the imprisonment ordered is for more than a year, although hard labor is not denounced, yet the sentence may be to the penitentiary. Shall such shifting, discretionary, and arbitrary rules settle the important constitutional question presented? That is, if the court chooses to make the place of imprisonment, on conviction, in the penitentiary, the offence is infamous; otherwise, not. Suppose trial and conviction had on an information under any of the many statutes, where it is in the discretion of the court to sentence to the common jail or to the penitentiary, or to fine and imprisonment, or imprisonment alone, with or without hard labor, etc., and the court in its discretion sentences to the penitentiary, does the offence thereby become infamous; whereas, if the sentence had been to the jail or to payment of a fine it would have been non-infamous?

But all are of the opinion that it is not, as a general rule, the punishment which determines the nature of the offence, and if it were not so the absurd result would follow that in the cases above supposed the character of the offence would not depend on its intrinsic quality, but on the discretion of the judge who passes sentence. These extreme illustrations are presented in order to show the importance of having some well-defined rules which all can understand.

It has been deemed better not to pass through a careful analysis of the many cases cited, or to review the same, but to present the subject with its attendant difficulties.

The conclusions reached are that under the United States constitution and statutes there are no infamous crimes except those therein denounced as capital, or felonies, or punished with disqualification as witnesses or jurors. If congress makes an offence infamous, it must be prosecuted through indictment; if it makes it non-infamous, it can be pursued through information. This necessarily follows from the fact that under the United States constitution there are no criminal offences other than what congress prescribes, and unless it declares directly or inferentially that an offence is infamous it must be pronounced otherwise. There is no other safe or consistent rule.

A reference, therefore, to the statute, cited at the beginning of this

opinion, makes it clear that the offence charged is not infamous within the rules herein stated. The fact that imprisonment "at hard labor" is denounced does not make the offence infamous within the purview of the constitution, and consequently the case was rightly tried on information.

The motion in arrest is overruled.

The cases cited and examined are appended:

*Wheaton v. Peters*, 8 Pet. 591; *U. S. v. Reid*, 12 How. 364; 1 Kent, Comm. \*336, 337; Coke, Litt. 6, *a b*; Blackstone, \*370; Phil. Ev. vol. 1, p. 22, note; 1 Chit. Crim. Law, \*600, \*601, p. 599; Phil. Ev. 23, note; *People v. Whipple*, 9 Cow. 707; *Clark's Lessees v. Hall*, 2 Harris & McHenry, 378; *People v. Herrick*, 13 Johns. 82; *Cushman v. Loker*, 2 Mass. 106; 1 Stark. Ev. 94, 95; 2 Hale, 227; 1 Bish. Crim. Law, §§ 743, 580, 581, 584, 621, 974; 1 Greenl. Ev. §§ 372, 373, p. 15; *Pendock v. Mackender*, 2 Wilson, 18; Coke, Litt. 391*a*, \*6*b*, note 1; 4 Bl. Com. 94, 95, 230; 1 Russell, Crimes, (Graves' Ed.) 44, 46, 47; *Rex v. Priddle*, Leach, 442; 2 Hale, P. C. 277; *Rex v. Davis*, 5 Mod. 75; 3 Wilson's Works, 371, 377; 1 Hale, P. C. c. 43, p. 508; Willis, 665; *State v. Gardner*, 1 Root, (Conn.) 485; *Com. v. Keith*, 8 Met. (Mass.) 531; *Lyford v. Farrar*, 11 Foster, (N. H.) 314; *U. S. v. Maxwell*, 3 Dill. 275, 278; *In re Truman*, 44 Mo. 181; *Fox v. State*, 5 How. 410, 438; *Moore v. State*, 14 How. 13; *U. S. v. Shepard*, 1 Abb. 436, 440; *U. S. v. Magill*, 1 Washb. 464, 465; *U. S. v. Hawthorne*, 1 Dill. 422; *State v. Keyes*, 8 Vt. 66, 65; 5 Watts & Serg. 342; *U. S. v. Hudson*, 7 Cranch, 34; *U. S. v. Lancaster*, 2 McLean, 431, 433; *U. S. v. Wiltberger*, 5 Wheat. 76, 93, 96; *U. S. v. New Bedford Bridge*, 1 Wood & M. 401; *State v. Stephenson*, 2 Bailey, 334; *U. S. v. Wilson*, 4 Blatchf. 435; Sergeant's Coast Law, 345; *U. S. v. Coolidge*, 1 Wheat. 415; *U. S. v. Beavens*, 3 Wheat. 336; *U. S. v. Burr*, 4 Cranch, 500; *Markney v. Madison*, 1 Cranch, 176; 4 Tucker's Blackstone, No. 10 of appendix; Conkling's Treatise, 83; *U. S. v. Cross*, 1 McArthur, 149; *U. S. v. Coppersmith*, 4 FED. REP. 198; *U. S. v. Sheperd*, 1 Hughes, 520; *U. S. v. Block*, 4 Sawy. 212; *U. S. v. Yates*, 6 FED. REP. 861; *U. S. v. Baugh*, 1 FED. REP. 784; *U. S. v. Waller*, 1 Sawy. 701; Whart. Crim. Law, (3d Ed.) 354 *et seq.*; 11 Am. Jur. and other authorities cited; *U. S. v. Okie*, 5 Blatchf. 516; *U. S. v. Clark*, Crabbe, 584; *U. S. v. Golding*, 2 Cranch, 212; *U. S. v. Patterson*, 6 McLean, 467, 468; *U. S. v. Mills*, 7 Pet. 138; *U. S. v. Clayton*, 2 Dill. 226; *Wilson v. State*, 1 Wis. 189; *Com. v. Barlow*, 4 Mass. 439; *Com. v. Macomber*, 3 Mass. 257; *Star Route Cases*, unreported.

UNITED STATES *v.* BURGESS.\*

(*District Court, E. D. Missouri.* January 30, 1882.)

1. CONSTITUTIONAL LAW—INFAMOUS CRIMES—CONSPIRACY TO MAKE COUNTERFEIT COIN—PRACTICE—INFORMATION.

A conspiracy to make counterfeit coin is not an infamous crime, within the meaning of article 5 of the amendments to the United States constitution, and may be prosecuted by information.

Motion in Arrest of Judgment.

*Drummond & Smith*, for the United States.

*Paul Bakewell* and *E. M. Stewart*, for defendant.

TREAT, D. J. An information was filed against the defendant for conspiracy to make counterfeit coin, whereupon a trial was had, and conviction followed. Many of the points considered in the case of *Wynn*, ante, 886, are involved in the question now presented. So far as the views of the court are stated in that case, they need not now be repeated.

Under the common law a conspiracy was not infamous unless it was for the subversion of justice, by the obstruction of its administration through perjury, subornation of perjury, spiriting away of witnesses, etc. Hence, if a like offence is by congressional enactment denounced a crime, without attendant consequences involving infamy, the same can be prosecuted by information.

If the common-law rule were to obtain, the crime charged would not be infamous, inasmuch as the alleged conspiracy, under section 5440, Rev. St., is not to subvert or obstruct the administration of justice through its administration in the courts.

It has been forcibly urged that a conspiracy to commit a felony which, if committed, would fall within the rule of *crimen falsi*, should, under the statute (5440) as to overt acts, be held to come within that rule. By what has been said in the case of *Wynn*, no such rule would prevail. If congress denounces a specified offence a felony it is so; not because like offences were such under the English law, but because congress chose so to make it. In this case, to commit which offence the conspiracy is charged, strange to say, the acts of congress have been frequently changed. In England there was, for technical reasons, a marked distinction between false coining and passing false coins. In the early statutes of the United States, counterfeiting coin was declared to be a felony, but in the re-enactment of these statutes

\*Reported by B. F. Rex, Esq., of the St. Louis bar.

subsequently the words "shall be adjudged guilty of a felony" were dropped. Hence, what was once a felony by force of the United States Statutes has ceased to be so through subsequent legislation. Independent thereof it must be considered that no conspiracy at common law was infamous except such as pertained to the subversion of justice. The conspiracy charged, for which the defendant has been found guilty on information, was not a conspiracy even to cause a felony to be committed, or to subvert the administration of justice. Still, under the rulings in *Wynn's Case*, if the conspiracy charged was not by act of congress declared infamous or a felony, the offence was rightfully prosecuted by information. Even if it had been a conspiracy to cause a felony to be committed, it would still be a simple misdemeanor.

The motion for arrest is overruled.

Cases cited and examined: Section 5440, Rev. St.; Act April 21, 1806, (2 St. at Large, 404, 405; 4 St. at Large, 121; 13 St. at Large, 120;) 3 Cox, Crim. Cas. 229; 4 Ward. 265; Cooley, Blackstone, 136; 13 Johns. 82; *In re Ville*, 2 Dod. 174; 12 Ward. 209; 2 Bish. 176; and those noted in *Wynn's Case*, ante, 886.

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### UNITED STATES v. MALONE.\*

(Circuit Court, S. D. New York. December 20, 1881.)

#### 1. INDICTMENT UNDER SECTION 3266, REV. ST.—ILLICIT DISTILLING—MOTION TO VACATE JUDGMENT.

Where conviction was had at March term and sentence imposed at the following May term, and application made at October term to vacate judgment and commitment, *held*, that the application was too late, as according to the rules of court it should have been made in arrest of judgment, or for a new trial before sentence was imposed, and that the term at which judgment was rendered having expired, no power remained in the court to vacate the judgment.

#### 2. INDICTMENT—SEPARATE COUNTS IN—EFFECT OF.

Where a prisoner is convicted on the first count and acquitted on the second, the sentence of the court is a judgment that the verdict upon the second count did not make void the verdict upon the first count, and cannot be brought in review by a motion made after final judgment.

Each count of an indictment, in judgment of law, charges a separate and distinct offence, and is, in fact and theory, a separate indictment. Accordingly, where a prisoner is charged in two separate counts with having used two different stills at different times on the same day and at the same place, and is

\*Reported by S. Nelson White, Esq., of the New York bar.

acquitted on one count and convicted on the other; there is no room to contend that the jury found him guilty and likewise not guilty of the same offence.

3. SAME—AVERMENT OF KNOWLEDGE IN.

When a statute prohibits generally and is silent as to intention, the pleader need not aver knowledge.

Motion to Vacate Judgment.

*Sutherland Tenney*, Asst. Dist. Atty., for the United States.

*Roger M. Sherman*, for defendant.

BENEDICT, D. J. The defendants were jointly indicted and tried together at the March term, 1881. The indictment contained three counts, framed under section 3266 of the Revised Statutes. The first count charged, in substance, that the defendants, on the fifth day of May, A. D. 1879, unlawfully did use a still for the purpose of distilling spirits on premises where ale was manufactured, to-wit, on the premises No. 513 West Fifty-second street, in the city of New York. The second count charged in substance that the defendants unlawfully and knowingly did use, and did aid and assist in using, a still for the purpose of distilling spirits on the premises No. 513 West Fifty-second street, on which said premises fermented liquor, to-wit, ale, was manufactured and produced. The third count charged, in substance, that the defendants unlawfully and knowingly did use a boiler for the purpose of distilling spirits on premises where ale was produced, that is to say, on the premises No. 513 West Fifty-second street, in the city of New York. The verdict of the jury upon the first count was not guilty as to Peter A. Malone and guilty as to Dominick Malone. On the second and third counts the verdict was not guilty as to both the defendants. Thereupon Peter A. Malone was discharged, and afterwards, and at the May term, on motion of the district attorney, Dominick Malone was sentenced to be imprisoned for the period of 16 months and to pay a fine of \$1,000.

Now, at the October term of the court, application is made in behalf of the prisoner to vacate the judgment and commitment. This application is based on the proposition that the offence charged in the first count of the indictment is the same offence charged in the second count, and that the acquittal on the second count must prevail, and makes void the verdict upon the first count. To this there are several answers:

*First.* The objection, if valid, comes too late. By the rules of this court, when a conviction is had, sentence is deferred to the next term of the court for the purpose of affording opportunity to move meanwhile in arrest of judgment or for a new trial, and the rules prescribe



that notice of such a motion must be filed within three days after the conviction, and the minutes of the trial, as settled by the judge who tried the case, be filed before the first day of such subsequent term. In this case the prisoner was sentenced at the term subsequent to the conviction, in the absence of any motion for a new trial or in arrest of the judgment in pursuance of the rules, and he cannot now, at this late day, after judgment, and when his term of imprisonment has partly expired, upon a motion like the present, urge an objection which, if valid and taken in the manner prescribed by the rules, would have arrested the judgment. By omitting to comply with the rules the prisoner must be deemed to have waived the right to raise in this court any question proper to be raised in the manner required by the rules.

*Second.* The judgment sought to be vacated was rendered at the May term of this court, and this application is made at the October term thereafter. The term at which the judgment was entered having expired, no power remains in the court to vacate the judgment. *Bank v. Labitut*, 1 Woods, 11; *Bank of U. S. v. Moss*, 6 How. 31.

*Third.* The question now presented in regard to the effect of the verdict rendered upon the second count was necessarily involved in the question of sentence, and when the prisoner was sentenced it was necessarily adjudged by the court that the verdict upon the second count did not make void the verdict upon the first count.

That determination cannot now be brought in review by an application like the present, made after final judgment.

It is said, however, that the judgment is void because there is no conviction, the defendant having been acquitted on the second count. But how can the judgment be held void when the court had jurisdiction of the person and of the subject-matter, and the record shows a valid indictment, a verdict of guilty upon one of its counts, and a sentence such as the law permits for the offence charged in such count? If there was error, as manifestly there was not, in the determination made at the trial in regard to the effect of the verdict of acquittal upon the second count, such error would not make void the sentence pronounced upon the verdict of guilty which the record shows to have been rendered on the first count.

Moreover, the contention in behalf of the prisoner that error was committed at the trial in construing the verdict to be a verdict of guilty rests upon the assumption that the offence charged in the second count is the same offence charged in the first count. The assumption is without foundation.

It is possible for a person to commit two similar crimes on the same day, and to be indicted and punished therefor, and two crimes are committed when two different stills are used at different times on the same day on premises where ale is manufactured, and it is not to be denied that two such crimes may be charged in one indictment, in different counts, nor that in such case each separate count of the indictment, in judgment of law, charges a separate and distinct offence. Each count in an indictment is, in fact and theory, a separate indictment. Different counts are allowable only on the presumption that they are different offences, and every count so imports on the face of the record. *Heard*, Crim. Pl. 235, 236. See, also, Rev. St. § 1024.

Accordingly, this record shows the prisoner charged in two separate counts with having used two different stills at different times on the day and at the place described; and there is no room to contend that, because the jury convicted the prisoner on one count and acquitted him as to the other, they found him guilty and likewise not guilty of the same offence.

It has been said—by way of argument, we suppose, for the record discloses no such thing—that, at the trial, evidence as to only one offence was given. If such be the fact, we fail to see how the conclusion follows that the prisoner was improperly adjudged to have been convicted of one offence. The evidence having proved the use by the prisoner of one still, and no more, on the day and at the place described, what was there for the jury to do but to render the verdict they did, namely, guilty of using one still, and not guilty of using another? On such an indictment, and upon such evidence, the verdict must necessarily be guilty on one count, and not guilty on the other. Plainly enough, therefore, the verdict in this case amounts to a conviction on the first count of the indictment, and no error was committed when it was so held at the time of passing sentence.

In addition to the point already considered we find upon the brief a second point not pressed at the argument that the first count of the indictment charges no offence because it omits to aver knowledge. It appears, from what has already been said in regard to the first point, that an objection like this cannot be considered upon the present application. But the point, if open for consideration, could not prevail, for the reason that knowledge is not made by the statute to be an ingredient in the offence. When a statute prohibits generally and is silent as to intention, it is clear that the pleader need not aver knowledge. *U. S. v. Smith*, 2 Mason, 143, 150; 1 Stark. Crim. Pl. 182.

Here the statute prohibits the use of a still for the purpose of distilling. This indictment charges an act such as is described in the statute, done for the purpose specified in the statute, and, consequently, charges the offence created by the statute.

BLATCHFORD, C. J., and BROWN, D. J., concur.

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*In re* SHIRLEY, Bankrupt.

(District Court, W. D. Pennsylvania. 1882.)

1. SEIZURE ON EXECUTION BEFORE THE FILING OF A PETITION IN BANKRUPTCY  
—PROVING UP UNPAID BALANCE—REV. ST. § 5075.

Where a judgment creditor issued an execution, and by virtue thereof the sheriff made a seizure of goods before defendant's petition in bankruptcy was filed and sold them after his adjudication, *held*, that such creditor, after applying the proceeds to his judgment, might prove any unpaid balance thereof; the case not falling within the purview of the prohibitory clause of section 5075 of the Revised Statutes.

In Bankruptcy. *Sur* register's report disallowing proof of the claim of the Eaton, Cole & Burnham Company.

G. S. Crosby, and Jas. P. Coulter, for report.

W. S. Purviance, for exceptions.

ACHESON, D. J. On February 4, 1878, the Eaton, Cole & Burnham Company, the plaintiff in a judgment against John T. Shirley, (the bankrupt,) in the court of common pleas of Armstrong county, issued thereon a *fi. fa.*, No. 214, March term, 1878, and placed the same in the hands of the sheriff. There was already in his hands a *fi. fa.*, No. 213, March term, 1878, against the same defendant, issued upon the judgment of the Kittanning Insurance Company. The next day (February 5th) the sheriff, by virtue of both these writs of *fi. fa.*, seized in execution personal property of the defendant, and advertised it for sale on the fourteenth of the same month. Robert Gailey, Sr., another judgment creditor of Shirley, on February 5th issued a *fi. fa.*, No. 218, March term, 1878, which came into the sheriff's hands the succeeding day. These facts appear from the exemplification of the common pleas record attached to the register's report, and an exemplification in Gailey's case on file in this bankruptcy number.

It is alleged there were still other executions in the sheriff's hands, but of this we have not the proper evidence; at least, we are without

particulars, except that the sheriff's return shows he sold as well on *fi. fa.*, No. 31, June term, 1878, as on *fi. fas.* No. 213 and No. 214, March term.

On February 11, 1878, John T. Shirley filed his petition in bankruptcy, and on the same day this court issued restraining orders against the Eaton, Cole & Burnham Company and certain other execution creditors, enjoining sales by the sheriff until a motion for an injunction could be heard. Upon such hearing the court refused the injunction and dissolved the restraining orders; whereupon the sheriff proceeded to sell the property so levied on, and sold the same between the ninth and thirtieth days of March, 1878, inclusive. J. T. Chalfant was chosen assignee of the bankrupt, March 28, 1878, and the assignment to him seems to have been made on the 30th.

A portion of the proceeds of the sheriff's sale reached the Eaton, Cole & Burnham Company's judgment, but a large part thereof remained unsatisfied. For this unpaid balance the company sought to make proof in bankruptcy, but the register would not allow the proof. The case is now before the court to review this action of the register, whose refusal to admit the proof rests upon the assumption that section 5075 of the Revised Statutes is conclusive against the company's right to prove. That section is as follows:

"Sec. 5075. When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereupon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or he may sell the property subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released, and delivered up, the creditor shall not be allowed to prove any part of his debt."

Is the case of the Eaton, Cole & Burnham Company within this prohibition? It is certain the company had neither a mortgage nor a pledge. Was, then, its levy, which anticipated the bankruptcy, a *lien* within the meaning of this section, and the goods in the hands of the sheriff property which the execution creditor was bound either to

release and deliver up or have sold in the manner here contemplated, in order to prove any part of its debt? The question seems to be new; at least, counsel have referred me to no decision upon it. It is not met by any of the cases cited by the register. I have nowhere found the precise point discussed, except in the treatise of Avery & Hobbs on the Bankrupt Law of the United States, at page 160, where it is said: "If he [the creditor] has a judgment and execution, he may finish his levy if his lien attached absolutely before bankruptcy, and, after applying the proceeds, he may be permitted to prove any unpaid balance."

The present is not a case of judicial proceedings commenced, or an execution sued out, after bankruptcy. When the jurisdiction of the bankrupt court attached, the goods were already rightfully in the custody of the law; a circumstance, I think, of controlling weight. To prevent a sale by the sheriff the interposition of this court was invoked, but the injunction sought was refused, and the temporary restraining orders which had been granted were dissolved. It is, therefore, quite inaccurate for the creditors opposing the proof to assert that the Eaton, Cole & Burnham Company sold the goods at sheriff's sale "in open disregard of the bankruptcy proceedings." It may be that the refusal to enjoin, and the dissolution of the restraining orders, cannot be interpreted as equivalent to a direct permission by this court to the company to sell upon its *fi. fa.*; but we may assume the court was satisfied that the execution was not impeachable as an unlawful preference, and that no good reason existed for its interference. The goods then being lawfully held by the sheriff, by virtue of execution process from another tribunal, how could the bankrupt court undertake to direct the manner of sale? The law regulated that. The case, therefore, as it seems to me, is not within the purview of the prohibitory clause of the bankrupt act relied on for excluding proof of this claim.

Moreover, the difficulties in the way of the Eaton, Cole & Burnham Company complying with the requirements of section 5075 would seem to have been insurmountable. The company was not the sole execution creditor, and hence could not control the proceedings. There were in the sheriff's hands at least two other executions—one prior and one junior—in respect to which this creditor was powerless.

Again, the sheriff having actually levied upon the goods before bankruptcy, the case did not stand on the footing of a mere *lien*. By virtue of the seizure the legal title to the property vested in the sher-

iff, who became answerable for its value to the execution creditors. *Hunt v. Breeding*, 12 Serg. & R. 41; *Hartlieb v. McLane*, 44 Pa. St. 510. Indeed, as respects other creditors, the seizure of goods in execution is said to be a satisfaction, *pro tanto*, of the plaintiff's judgment, unless without fault of his own he is deprived of the fruit of his levy. *Duncan v. Harris*, 17 Serg. & R. 435; *Lyon v. Hampton*, 20 Pa. St. 46.

In every point of view I think the prohibitory clause of section 5075 is inapplicable to this case, and I am constrained to dissent from the conclusion of the register.

And now, January 31, 1882, the order of the register in this matter is set aside, and it is ordered that the Eaton, Cole & Burnham Company be admitted to make proof of its claim.

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SHEDD v. WASHBURN and others.

(Circuit Court, D. Massachusetts, January 28, 1882.)

1. LETTERS PATENT—FASTENERS FOR SHUTTERS—VALIDITY.

Letters patent No. 166,819, for an improvement in fasteners for shutters, are not invalid for want of novelty.

2. NOVELTY—UTILITY—EXTENSIVE USE.

Extensive use is, of itself, some evidence of novelty and utility.

In Equity.

*Thos. H. Dodge*, for complainant.

*John L. S. Roberts*, for defendants.

LOWELL, D. J. The plaintiff describes and claims in his patent, No. 166,819, an improvement in fasteners for shutters, or blinds, made of wire, and fully shown in the drawings, and by a description which would hardly be intelligible without the drawings. The defendants make and sell this precise article; and the only question in the case is whether the plaintiff has a valid patent, no matter of how limited a scope. In my opinion, he may hold a narrow claim for the very article which he describes. Other fasteners for shutters and blinds had been made of a single piece of wire, but none which had the several elements of his claim similarly combined. The claim is for "a wire blind fastener, having a horizontal spring arm, A', projecting end, G, inclined or brace arm, E', intermediate coil spring, E, and horizontal eye, F; the same being constructed and adapted to be applied to the blind or shutter, substantially as and for the purposes

set forth." The Haynes fastener, if earlier than the plaintiff's, which is somewhat doubtful, does not have a coil which operates like that shown in the patent; the Waterhouse exhibit does not have the inclined or brace arm, to any useful extent; the Orr fastener has no coil. All these earlier devices appear to have worked well, but the plaintiff's changes were improvements, and brought his fastener into use extensively, which is, of itself, some evidence of novelty and utility. Decree for the complainant.

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COES v. THE COLLINS CO.

(Circuit Court, D. Connecticut. January 16, 1882.)

1. LETTERS PATENT—WRENCHES—INFRINGEMENT.

The first claim of reissued letters patent No. 3,483, granted to Loring Coes, June 1, 1869, for an "improvement in wrench," which is a claim to an improved Coes wrench, so constructed that the thrust or back strain of the rosette screw, when the wrench is used, shall be borne by the shank instead of the handle of the wrench, substantially as described, is not infringed by a wrench made in accordance with the description in letters patent No. 50,364, granted to Jordan & Smith, October 10, 1865, for an "improved wrench."

2. SAME—SAME.

To remedy the difficulty experienced in the use of the Coes wrench of 1841, the plate and the ferrule being often broken or bent and pushed out of place, and the wooden handle split or crushed, George C. Taft substituted in place of one rosette three parallel rosettes, with narrower peripheries, revolving at right angles to the line of motion of the adjustable jaw in three parallel grooves in the adjacent face of the main bar, each groove bearing against both faces of its rosette, so as to prevent the rosette and the screw from being carried bodily towards the fixed jaw, and to cause the back-thrust to be received by the side of the groove furthest from the fixed jaw, instead of as before, by the plate. To effect the same result, the defendant put underneath the plate a screw nut, in the extension of the main bar, a screw thread being cut in the extension, and this screw nut is screwed up tight against the bottom of the screw nut by a screw nut at the extreme end of the extension below the handle. The rosette is the same as the Coes rosette of 1841, and always maintains the same position relatively to the handle. *Held*, that the means employed by the defendant are different from those employed by Taft, and are not the mechanical equivalent.

In Equity.

George L. Roberts, for plaintiff.

William E. Simonds, for defendant.

BLATCHFORD, C. J. This suit is brought on reissued letters patent No. 3,483, granted to Loring Coes, the plaintiff, June 1, 1869, for an "improvement in wrench," the original patent, No. 40,590, having been granted to Thomas H. Dodge, as assignee of George C. Taft,

the inventor, November 10, 1863, for an "improvement in wrenches." The specification of the reissue is signed by Loring Coes, and is as follows, including what is inside of brackets and what is outside of brackets, omitting what is in italics:

"Figure 1 represents a prospective view of [a 'Coes wrench' having the said Taft's improvements applied thereto] *my improvement*, and figure 2 represents [sections of detached parts of the wrench shown in figure 1] *a detached view of the 'rosette' and therewith connected*. Similar letters of reference indicate like parts in the drawings. \* \* \* [The nature of the said Taft's invention relates to a mode of constructing the Coes wrench patented April 16, 1841, in such a manner that the handle shall be relieved from the back-thrust or strain of the rosette screw, when the wrench is used. In my said wrench the rosette presses against the ferrule, and the ferrule, in turn, against the front end of the handle, whereby the handle was often split and broken. In the drawings] A is the shank of [the] *my wrench*; B the stationary jaw; and B' the sliding jaw, through the part B'' of which the operating screw, C, works. D is the rosette, formed in one piece, *as shown*, with the screw, C, [as shown,] and journalled, at *a* to [the] ferrule, E. Parallel grooves, *d, d, d*, [in this instance] are cut in the shank, A, [at right angles to the line of motion of the movable jaw, B''] in which [grooves] projections *e, e, e*, of the rosette turn. The projections *e, e, e*, are made parallel to each other, and are bevelled on one side, as shown, to lessen the friction of the rosette [in] upon turning. The operation is as follows: To adapt the opening between the jaws to the size of the object to be clasped thereby, the operator turns the rosette to the right or left, as the size of the object [may require] *will indicate*, which will turn the screw in the part, B'', of the sliding jaw, B', thereby increasing or diminishing, as the case may be, [and, as to the way turned, will increase or diminish] the distance between the jaws, as required. The [advantage] *advantages of having a rosette* of this [improvement] *form* is that *it sustains* the pressure which [would otherwise] *otherwise would come* [upon] *on* the [handle is transferred to the shank of the wrench, thus obviating one and really the only serious objection to the said Coes wrench,] *ferrule, E, which pressure is often so great as to break it off, or displace it, thus rendering the whole wrench useless. Having thus described my improved wrench*, I am aware that the [rosettes] *rosette* of screw wrenches [have] *has heretofore been constructed with [screw threads] a screw thread*, and [such devices are not claimed] *I do not claim such device*, but what [is claimed as the invention of the said George C. Taft, and desired to have secured] *I claim and desire to secure by letters patent is:*"

Reading in the foregoing what is outside of brackets, including what is in italics, and omitting what is inside of brackets, gives the text of the specification of the original patent. There are three claims in the reissue, as follows:

"(1) An improved Coes wrench, so constructed that the thrust or back strain of the rosette screw, when the wrench is used, shall be borne by the shank, instead of the handle of the wrench, substantially as described. (2) A notch



formed at right angles to the line of motion of the movable jaw, in the shank of a Coes wrench, for relieving the handle from the back strain of the rosette screw, substantially as described. (3) The combination of two or more parallel grooves, *d*, in the shank, A, with two or more corresponding projections, *e*, on the rosette, D, the same not being spiral, but running at right angles to the line of motion of the jaw, substantially as described."

There was only one claim in the original patent, as follows:

"The combination of the parallel groove, *d*, *d*, *d*, in the shank, A, with the corresponding projections, *e*, *e*, *e*, on the rosette, D, the same not being spiral, but running at right angles to the line of motion of the jaw, thus relieving the ferrule from all strain, while retaining the rosette in the same relative position as respects the handle of the wrench, substantially as and for the purposes set forth."

The defendant's wrench which is alleged to infringe claim 1 of the reissue is made in accordance with the description in letters patent No. 50,364, granted to Jordan & Smith, October 10, 1865, for an "improved wrench."

The plaintiff's wrench and the defendant's wrench both of them contain improvements engrafted upon the form of wrench shown in letters patent No. 2,054, granted to Loring Coes, the plaintiff, April 16, 1841, for an "improvement in the method of constructing screw wrenches," and reissued to him, No. 139, June 26, 1849, for an "improvement in screw wrenches." The main feature of the Coes wrench of 1841 was the moving of the adjustable jaw, by a screw placed at the side of, and parallel with, the main bar, which carried the permanent jaw at one end of it and the handle at the other end, the screw taking into an attachment to the adjustable jaw, and working that jaw to and fro without itself moving otherwise than by rotation, and having on its end furthest from the fixed jaw a rosette or milled head, which never approached to nor receded from the fixed jaw, and could therefore be rotated, so as to rotate the screw, by the thumb of the hand which held the wrench, because the rosette always retained the same position relatively to the handle of the wrench. A wooden handle was slipped over the handle end of the main bar, and a screw nut on that end bearing against the adjacent end of the wooden handle held the other end of the wooden handle against a ferrule and that against an iron plate and that against a shoulder on the main bar. The iron plate projected out on the same side with the rosette and next that face of it furthest from the fixed jaw. The plate carried the revolving end of the screw, the bearing point projecting beyond the face of the ro-

sette, such revolving end rosette and screw being practically one piece and revolving together. In order to prevent the screw and the rosette from being carried bodily towards the fixed jaw by the sliding of the adjustable jaw on the main bar, a notch as long as the width of the periphery of the rosette was cut in or out of the substance of the main bar opposite the place intended for the permanent position of the rosette, and the periphery of the rosette turned within the notch so that the edge of the rosette face nearest to the fixed jaw would catch against the edge of the notch, the angle of the notch being towards the fixed jaw. But while this Coes wrench of 1841 had advantages, it had difficulties. There was a pressure against the plate by the rosette face furthest from the fixed jaw and by the end of the screw in its bearing, and thus the back strain or thrust from the bite of the jaws was communicated through the adjustable jaw, its attachment, the screw and the plate, to the ferrule, and so to the wooden handle, before it reached the main bar through the screw nut at the handle end. The plate and the ferrule were often broken or bent and pushed out of place and the wooden handle was split or crushed. It became desirable, therefore, to devise a way of taking off this back-thrust before it could reach the plate or the ferrule and thus the wooden handle, and of bringing it against the resisting strength of the main bar itself between the plate and the fixed jaw. Taft did this by his invention of 1863. He took the Coes wrench of 1841, with its main bar, fixed jaw, adjustable jaw, attachment thereto, screw, bearing, plate, ferrule, wooden handle, screw nut, and extension of main bar, all as they were, and, in place of one rosette, he put in three parallel rosettes, with narrower peripheries, revolving, at right angles to the line of motion of the adjustable jaw, in three parallel grooves in the adjacent face of the main bar, each groove bearing against both faces of its rosette, so as not only to prevent the rosette and the screw from being carried bodily towards the fixed jaw, but to cause the back-thrust to be received by the side of the groove furthest from the fixed jaw, instead of, as before, by the plate. The grooves being cut in the main bar, the back-thrust was intercepted by them, and the plate and the ferrule and thus the wooden handle were relieved from all liability to injury from the back-thrust, while the rosette was retained in the same relative position to the handle which it had in the Coes wrench of 1841. In the original patent of 1863 the plate and the ferrule together are called the ferrule, *æ*, and it is stated that by the new arrangement the pressure which would otherwise come on the ferrule is taken off from it, such pressure being "often so great as to break it off,

or displace it, thus rendering the whole wrench useless." The claim in that patent states that the arrangement relieves the ferrule from all strain, while the rosette is retained in the same relative position as respects the handle of the wrench. The reissue states that the nature of the invention relates to a mode of constructing the Coes wrench patented in 1841 in such a manner that the handle shall be relieved from the back-thrust of the screw, the arrangement of the wrench of 1841 being that the rosette pressed against the ferrule, (the ferrule ~~is~~ being the plate and ferrule together,) and the ferrule against the front end of the handle, whereby the handle was often split and broken. It is not said, in the reissue, that the rosette continues to maintain always the same position relatively to the handle, but that is necessarily implied in speaking of the wrench improved upon as the Coes wrench patented in 1841, and is a necessary result of what is described in the text and shown in the drawings. The reissue also states that the advantage of the improvement is that the pressure which would otherwise come upon the handle is transferred to the shank of the wrench.

In the monkey-wrenches used before the Coes patent of 1841, a screw nut on the body of the main bar moved the movable jaw, a screw being cut on the body of the main bar, as shown in figure 2 of the Coes patent of 1841. In that form the direct linear or columnal strength of the main bar was availed of to resist the back-thrust. When the Coes improvement of 1841 was introduced that advantage was thrown away. The improvement of Taft in 1863 was an effort to restore that advantage and yet retain the Coes improvement of 1841. In the defendant's wrench the Coes wrench of 1841 is taken, with its main bar, fixed jaw, adjustable jaw, attachment thereto, screw, rosette, bearing, and plate. But underneath the plate a screw nut is put on the extension of the main bar, a screw thread being cut in the extension, and this screw nut is screwed up tightly against the bottom of the plate so that the back-thrust comes against the extension at the screw thread. The wooden handle is slipped over the end of the extension, and is held up against the bottom of the said screw nut by a screw nut at the extreme end of the extension below the handle. The rosette is the same as the Coes rosette of 1841, and always maintains the same position relatively to the handle.

The first claim of the reissue, which is the only claim alleged to have been infringed, is a claim to "an improved Coes wrench so con-

structed that the thrust or back-strain of the rosette screw, when the wrench is used, shall be borne by the shank instead of the handle of the wrench, substantially as described." Mr. Waters, an expert for the plaintiff, testifies that the defendant's wrench is, in his judgment, the same in its construction and mode of operation as the wrench described in the reissue and referred to in the first claim, because the essential novelty of the wrench described in the reissue consists in a mode of construction to relieve the Coes wrench of the difficulty described in the reissue; that this is done in the reissue by bringing the back-thrust to bear against projections on the main bar, running across it, against which the rosettes on the screw act; that in the defendant's wrench the end-thrust is taken on the plate, and then, through the screw nut, comes on the shank by means of the threads inside of the screw nut and the threads on the shank, which bear against the former threads; and that this is only an equivalent for the projections on the main bar, in the reissue, against which the rosettes bear. Another of the plaintiff's experts, Mr. E. S. Renwick, states that the two wrenches obtain by substantially the same means the result of sustaining the strain of the movable jaw and of the rosette screw by the shank or bar of the wrench, in this: that in the defendant's wrench the rosette and the screw are combined with the rectangular part of the shank, or its equivalent, by a notch, which limits the movement of the rosette and screw in both directions, without the intervention of the handle, the notch having its upper shoulder formed by a portion of the rectangular shank itself, and its lower shoulder formed by the upper surface of the plate, which plate is rigidly secured to the shank; and that holding the lower shoulder of the notch to the shank by the screw nut in the defendant's wrench is a well-known substitute for the Taft method of holding the lower shoulders of the grooves to the shank by the substance of the material of which they are composed.

It is entirely clear, as is testified to by Mr. H. B. Renwick, the defendant's expert, that if, in the Coes wrench of 1841, the back-thrust of the screw reaches the plate it is transmitted through it and the wooden handle, and the nut at the end of the shank, which is an extension of the main bar, to the shank, so that it is borne by the shank. It comes back thus to the column formed of the main bar and shank as one piece. If the plate bends, or the ferrule is displaced, or the wooden handle is broken, those are incidents of the pressure, and those incidents happen only because the thrust is being

resisted by the shank. Taft brought the pressure back to the main bar by taking it off by the grooves and rosettes, before reaching the plate, thus relieving not only the wooden handle and the end nut, but also the plate. He did this by right-angled grooves and rosettes, interposed before reaching the plate. If the first claim of the reissue claims any more than this it cannot be maintained. As a claim to so constructing a Coes wrench of 1841 that the back-thrust shall be borne by the shank ultimately, through the plate and the handle and the end nut, it would cover the Coes wrench of 1841. As a claim to having the shank bear the thrust at some points before the handle is reached, without reference to the mechanical means, it is invalid. It must be regarded as a claim to the means shown "substantially as described." As such it is not infringed. Taft left the plate and the handle and the end nut outside of the course of the back-thrust. The defendant's wrench does not leave the plate outside of such course. In it the thrust acts fully on the plate, and a screw nut is interposed between the handle and the plate, having on it and on the shank the usual spiral threads. The two inventions are inventions in different directions, though both have a common ultimate object and design. The wooden handle is relieved in both; but that is not sufficient to make out infringement. The plate is relieved by Taft and not by the defendant. Claim 1 of the Taft reissue must be read as a claim to an improved Coes wrench, constructed substantially as described. What is said in it about the bearing of the thrust by the shank instead of the handle is merely a statement of a result which the construction will affect, and is not a statement of means or mechanism. It is a claim to means, to the mechanism described, which effects the result stated. The means employed by the defendant are different, and are not a mechanical equivalent for the means in the reissue.

The bill is dismissed, with costs.

## THE PHAROS.

(District Court, S. D. New York. January 3, 1882.)

## 1. BURDEN OF PROOF.

Where goods are received on board ship in good condition and found to be damaged when delivered, the burden of proof is upon the carrier to show that the damage arose from some peril excepted by the bill of lading.

## 2. STOWAGE.

Different parts of the cargo must be so stowed as not unnecessarily to injure one another.

## 3. BILLS OF LADING.

The libellants shipped 432 bales of wool on the ship *P.*, at San Francisco, to be delivered in New York, on the usual bills of lading. On delivery, 24 bales were found injured by sea-water, and 76 other bales were found damaged from some other cause, being rotted and caked on the bottom or sides of the bales, or in strips across them. Wet redwood formed a part of the cargo, upon which, as a temporary floor, the wool was placed, with dunnage strips between, separated by open spaces. It was proved that such rotting might arise from contact of the bales with wet wood, or from very close proximity to it, when steaming from the wet; also, that the ship met several severe storms upon the voyage, and took in water which penetrated between-decks, and that there was much sweating of the cargo. *Held*, that an adequate cause of the damage by sea-water being shown, the injury to the 44 bales from that cause was within the excepted perils, and that the vessel is not liable for that part of the loss; but that the damage to the 76 bales arose from contact with, or too close proximity to, the wet redwood taken on board as a part of the cargo, against which the carriers were bound to protect the wool by proper stowage, and that the vessel is liable for such damage.

## In Admiralty.

*William A. Walker* and *F. B. Jennings*, for libellants.

*Owen & Gray*, for claimants.

*BROWN, D. J.* This is an action *in rem* to recover damages for injury to 120 bales of wool, by sea-water and contact with wet redwood, in the ship *Pharos*, on her voyage from San Francisco to New York, in 1879. The wool in question was part of 432 bales shipped on account of the libellants, in good condition, under the ordinary bills of lading, to be delivered to the libellants in like good order and condition, perils by the sea excepted. The *Pharos* sailed from San Francisco on the fifteenth day of May, 1879, and arrived in New York on August 29th of that year. She carried a mixed cargo, including about 1,900 bales of wool, and 140,000 feet of redwood, in planks or timbers of various dimensions. The redwood was mostly laid as a floor upon the beams of the lower deck. Over this, dunnage, consisting of strips of board about one inch thick and a few inches apart, was laid, and upon this a large quantity of the wool was

stowed. Along the wings of the upper and lower between-decks piles of redwood were also stowed, some three feet in height, on top of which bales of wool were laid, separated by dunnage, and bales were also stowed between the wings, separated from the redwood by similar upright strips of dunnage.

The Pharos was a new vessel, first class in every respect, and in a seaworthy condition when she left San Francisco. In her voyage round the cape she met with several severe storms, whereby she took in considerable water, some of which penetrated between her decks. When the libellant's wool was unladen in New York, 24 bales were found to be damaged from sea water, and 76 other bales were shown to be damaged in a manner clearly distinguishable, as the witnesses testify, from mere damage by sea water. Some of these had the entire side of the bagging rotten, and the wool beneath caked and rotten; others had the entire side in a similar condition, except two or three straight strips across the side of the bale where the bagging and wool beneath would be perfectly sound, while on each side of these straight strips the bagging and wool were rotten; some had the edges of the bale in a similar condition, and some had the end affected in a similar manner. It did not appear in what part of the ship the libellants' wool was stowed, nor were the libellants aware of the damage until the wool was discharged. The master testified that wool, if in contact with wet wood, would become caked and rotten. The rotted strips in the bales of wool might, in his opinion, have been injured from the moisture or steam rising from the wet redwood between the strips of dunnage. Much of this wood, he said, was loaded when wet, a considerable portion having been previously submerged in the water. He testified, in a general way, that the cargo was well protected by dunnage, and claimed that there was no injury except such as arose from the steaming and sweating of the cargo, and the access of sea water from perils of the sea. One of the port-wardens testified to seeing one bale showing a similar strip across it unstowed from a place at a considerable distance from any redwood; another saw some bales in contact with the redwood where the dunnage was out of place. Along the wings only every other strip of dunnage was fastened, and many of these were out of place. The impress of bales of wool was also noticed stamped upon some redwood discharged, as it lay on the wharf. The witness who observed this, an inspector for one-half of the insurance companies

interested in the cargo, requested permission to examine the stowage which was not granted.

During the voyage a slight leak became evident—from some cause unknown. It was sufficient to require from five to ten minutes' spell at the pumps every four hours,—not an unusual thing, as Capt. Spencer testifies,—which did not make the ship in the least unseaworthy. After the discharge of the vessel it was found to arise from what is known as a “private leak”—a slight defect in one of the outer planks of the ship. Its position was such that no sea water could have gained access to the cargo, which was protected by the inner ceiling, and I am satisfied that this had nothing to do with the injury to the wool.

The claimants received the wool in a good condition for transportation as common carriers; they were bound to deliver it without injury, except from perils of the sea. It was clearly proved that 120 bales were seriously damaged when delivered in New York. This injury occurred while the wool was on board ship. It was not incumbent upon the libellants, therefore, in the first instance to prove the particular cause of the injury. The burden of proof is upon the claimants to show, in exoneration of their liability, that the injury arose by some peril of the sea within the exceptions of the bill of lading.

In *Clark v. Barnwell*, 12 How. 280, the court say: “After the damage to the goods has been established the burden lies upon the respondents to show that it was occasioned by one of the perils from which they were exempted by the bill of lading;” and if brought “within one of the accidents or dangers of navigation, it is competent to the shippers to show that it might have been avoided by the exercise of reasonable skill and attention; for then it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty.” *The Sabioncello*, 7 Ben. 357; *The Black Hawk*, 9 Ben. 207.

As regards the 24 bales I think the evidence discloses sufficient probability of injury through sea water from perils of the sea to acquit them of responsibility for that part of the damage. *The Neptune*, 6 Blatchf. 193. As to the 76 bales, I think their defence is not made out. The peculiar nature of this injury in the caking and rotting of particular portions of the bales shows that it could not well have arisen in any other way than by direct contact with wet wood, or by



such close proximity to it through unprotected openings as would permit its steaming to produce similar damage, and the one was as much negligence as the other. The considerable number of bales rotted in strips, compared with the small number affected by sea water, shows that the wetting of the wood, whether of dunnage or of redwood, could not have arisen from the drip of sweating, nor from sea water taken in through perils of the sea. There was at no time any flooding of the between-decks, and there could be no dripping of the sea water which would not have affected the upper surface of all the bales of the upper tier much more than it could have affected any dunnage strips which might be in contact with the bales of wool. I must find, therefore, that the caking and rotting of the wool were owing to its contact with, or very near proximity to, wet and steaming redwood. Had the wet wood been entirely covered by dunnage it would seem that the wool would have been uninjured; but if, as it is alleged, spaces were needed to be left open for ventilation, this could not be done at the expense of the wool; and either the redwood should have been rejected, or, if taken on board, put where it would not injure other portions of the cargo. The contact or close proximity of the wool and the wet wood could have been easily avoided, and failure to protect the wool properly is such a want of skill and attention as constitutes negligence in stowage which renders the carrier liable. *Mainwaring v. The Carrie Delap*, 1 FED. REP. 874.

The evidence afforded by the impressions of wood upon the bales, and of the bales upon the redwood, cannot be overcome by mere general testimony that the dunnage was well laid. Along the wings the dunnage was proved to have been insecurely fastened, and the general testimony of the master and other witnesses, that the dunnage over the redwood in the lower between-decks was well laid, is much qualified by the fact that they saw but a small portion of it laid.

Even if the burden of proof was upon the libellants to show the particular cause of the injury, I think it is sufficiently shown. The presence of a sufficient cause is shown in the wet redwood, whether in contact with or in close proximity to the wool, either of which would render the carrier liable; while no other consistent or adequate cause of the damage to the 76 bales appears.

There must, therefore, be judgment for the libellants, with costs, and a reference to ascertain the damage to the 76 bales above referred to.

## THE AUSTRIA, etc.\*

(District Court, D. California. January 31, 1882.)

## 1. INEVITABLE ACCIDENT.

A ship and a schooner were fastened, respectively, to the northerly and southerly sides of the same slip. In consequence of the violence of a gale from the north, the forward fastenings of the ship gave way, and her bow was beginning to swing to the south, when those on board of her hailed the schooner to get away, as the ship was drifting. In doing so the schooner foundered. Held, that the ship was not responsible for the injury, as her original fastenings were all that were reasonably necessary under the circumstances, and she was, otherwise, free from negligence.

In Admiralty.

*Milton Andros*, for libellants.

*W. H. L. Barnes*, for claimants.

HOFFMAN, D. J. On the eighth of March, 1881, the ship *Austria* and the scow-schooner *Modoc* were lying at a pier on the north side of a slip on Oakland Long Wharf. The *Modoc* arrived at about 12 or 1 o'clock, and made fast to the wharf astern of the *Austria*; the latter being further up the wharf towards its head. At about 4 o'clock p. m. the *Modoc* moved further up the slip, to a position south and abreast of the *Austria*, with the object of getting under her lee, as the weather had become threatening. She put out several lines to the wharf, forward and astern of the *Austria*, and attached one to the latter vessel about amidships. The wind continued, as night came on, to increase in violence, and at about 8 o'clock the *Modoc* was hailed from the *Austria* to let go the line attached to that vessel. Before, however, this could be done, the line was cast off by the *Austria's* crew. The *Modoc* then hauled off to the south side of the slip, to a position to the south of and not far from abreast of the *Austria*.

A short time afterwards the schooner was hailed from the *Austria* to get away, as the latter was drifting. She had in fact parted her forward fasts, and her bow was swinging—beginning to swing round towards the south before the northerly gale. There seemed to be imminent danger that the schooner would be crushed between the *Austria* and the wharf. She therefore commenced hauling out between the *Austria's* stern and the stern of the *Transit*, a large steamer which was attached to the southerly pier of the slip. In so doing her boat was crushed, but whether by contact with the *Austria* or by the falling of the schooner's main boom, the topping-lift of which had fouled with the rigging of the *Transit*, is disputed. The *Modoc* contin-

\* Re-reported, 14 FED. REP. 293.

ued to haul over towards the southerly pier, which she finally reached, but foundered almost immediately on coming in contact with it. The Austria's bows in the mean time had continued to swing around until they were checked by the bowsprit coming in contact with the railroad company's sheds on the southerly pier. As her stern lines still held, this brought her up, and she remained in the same position during the remainder of the night. It is claimed by the libellants that the accident was the indirect but not remote consequence of the Austria's negligence in breaking adrift. The claimants contend:

(1) That the breaking adrift was the result of inevitable accident; and (2) that even if the Austria was guilty of negligence the foundering of the schooner was the direct consequence of her being overladen and unseaworthy; that her deck load had become saturated with water, rendering her crank and top-heavy, and giving her a list to starboard, which constantly increased until she capsized in the heavy sea which was setting in under the piles of the wharf; and that, as there was no actual collision of the vessels, the foundering of the Modoc was too remote a consequence of any negligence of which the Austria might have been guilty, to render her liable.

The circumstances of this case suggest several interesting questions, which, however, in the view I take of it, do not require a definitive solution. In general, it would seem that when a vessel, herself free from fault, has been obliged by the fault of another to change her position or attempt any other maneuver to avoid impending danger, and in doing so sustains an injury, the damage should be deemed to have been caused by the vessel by whose fault she was compelled to incur the risks of making the maneuver. But in this, as in cases of apprehended collisions, she is bound to exercise reasonable judgment and skill, in the absence of which the damage will be apportioned. *The Grace Girdler*, 7 Wall. 203. But suppose the new position which she is obliged to take is more perilous than her original one, and that before she can move to a safer position a storm arises, the consequences of which she would have escaped in her old position. Is the offending vessel, which originally compelled her to shift her position, liable for the damages done by the storm?

Again. A vessel threatened with injury through the fault of another, is, as already remarked, bound to exercise reasonable skill and diligence to avoid or mitigate its consequences. Is she not also bound to be well conditioned and appointed, with all the necessary appliances to avoid a collision, even though the danger of its occur-

rence may have arisen from the default of another? Suppose, for example, that in attempting to escape from an impending collision a vessel sustains damage by reason of defective steering apparatus or rigging, from which she would have escaped had it been sufficiently provided. Or suppose that, being compelled to slip her anchor, she might readily have secured her safety had she been provided with proper lines and hawsers, but owing to the entire absence of these she is stranded. Or suppose that she is overladen and unmanageable, and from that cause unable to execute a maneuver which she might otherwise have safely accomplished.

It would seem that in these and similar cases that when a vessel is endangered by the fault of another, and is unable to secure her safety through the want of the usual and proper appliances and means, she is herself as much in fault as if her inability comes from the want of proper skill and diligence on the part of her officers and crew. But if her inability has been the result of a peril of the sea or *vis major*, the consequences of which she has been unable to remedy, then her defective means should not be imputed to her as a fault.

It is unnecessary to pursue this discussion further. Perhaps what has already been said is superfluous, as it is certainly *obiter*. In my judgment the accident in this case is not to be attributed to the negligence of the *Austria*, but to "inevitable accident." Numerous authorities defining the meaning of this term, and illustrating its application, have been cited at the bar. It will be sufficient to quote the language of the supreme court in a single case:

"Inevitable accident," says the court, "is where a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger, and an accident occurs. The *highest degree* of caution that can be used is not required. It is enough that it is reasonable under the circumstances; such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view—the safety of life and property." *The Grace Girdler*, 7 Wall. 203.

The *Austria* was made fast to the wharf by a gang of stevedores, under the direction of Capt. Batchelder, a master stevedore of 30 years' standing, assisted by two foremen of great experience.

It is unnecessary to enumerate the various chains and hawsers by which she was attached to the wharf. In the judgment of all concerned in the operation they were sufficient to secure her safety

under all circumstances likely or possible to occur. Two witnesses, and those of no great experience, suggest that it would have been better to have put out her anchor chain.

But this criticism is made after the event, and one of them, when informed what fasts were actually put out, admitted that he thought them sufficient except in some great emergency.

Capt. Batchelder declares that even with his experience of the result he would not moor the vessel differently if the work had to be done over again. He expresses the opinion that if he had put out the anchor chain it would either have parted or torn out the pile to which it was attached. If the mooring had been insufficient it would have been easy to establish the fact by the testimony of experts. No stevedore of experience has been called to express such an opinion.

I think, therefore, that the measures adopted by the Austria were, in the language of the supreme court, "reasonable under the circumstances, such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view."

It is contended on the part of the libellants that the Austria was negligent in not putting out other fasts after the first ones had parted. The interval that occurred between the time when the fasts began to part and her bringing up against the shed was from 20 to 25 minutes. No expert has been called to state what the persons on board, three in number, could have done more than they actually did to prevent the vessel from breaking adrift. They were certainly busy paying out chain, etc., and doing what seemed best to them for the safety of the ship.

It is not shown that three men were not the usual and proper crew or watch for a vessel lying in a slip and supposed to be securely fastened to a wharf.

But the conclusive answer to the suggestion is that the negligence suggested did not and could not have had any effect to avert the disaster. The schooner was warned to move away when the danger of the ship's breaking adrift became apparent. The latter was, in fact, brought up by the sheds on the opposite wharf without touching the schooner, though possibly she may have crushed the boat at her stern. The accident occurred during the attempt of the schooner to get out of the way of the vessel which she was warned was drifting down on her. That attempt she made as soon as she was apprised of her danger.

If, then, the men on board the ship had succeeded in preventing her bows from breaking adrift, the result would have been in no respect

different. She did bring up against the shed without touching the schooner. The latter foundered in the attempt to extricate herself from a position of imminent danger. That attempt she had already entered upon, and the result would have been the same if additional fasts, sufficient to secure the ship, had been put out, and her further drifting thereby arrested, just as it was a very short time afterwards by the coming in contact with the sheds.

The negligence, if any, to be imputed to the Austria, is negligence in the original moorings, and of this, for the reasons assigned, I do not find her guilty.

Libel dismissed.

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### THE B. C. TERRY.

(*District Court, S. D. Georgia. December 14, 1881.*)

#### 1. DERELICT—SALVAGE COMPENSATION.

Salvors in derelict cases are entitled to adequate compensation, according to the circumstances of each case. A rule of fixed proportions no longer obtains.

#### 2. SAME.

When the officers and crew of a burning vessel leave it, without any intention of returning to resume possession, or hope of saving it, it is a case of derelict in the sense of the maritime law; or, if not in the exact and technical meaning of the term, a case of derelict, a case of *quasi* derelict, equally meritorious, though the vessel at the time is in a navigable river, and the master, mate, and some of the crew return to it one or more times before the fire is subdued.

In Admiralty.

*Mr. Levy* and *Mr. Abrams*, for libellants and intervenor.

*Mr. Mercer*, for respondents.

ERSKINE, D. J. On the nineteenth of last April, H. J. Dickerson and others, as owners of the steam-tugs Forest City and Benjamin Bramell, filed a libel in this court, and upon certain alleged grounds therein prayed a decree for salvage against the schooner B. C. Terry and cargo, which cargo consisted of crude sulphur and empty barrels; and on the twenty-seventh of the same month the American Dredging Company lodged an intervention against the same property, and likewise asked for a decree of salvage. The schooner has been sold and the proceeds deposited in the registry. At the opening of the cause it was agreed that the value of the schooner, or rather her proceeds, should be put at \$2,500; the crude sulphur at \$5,750; and

the empty barrels at \$1,544,—aggregating \$9,794. It was not questioned by the respondents—claimants of the schooner and cargo—that the aid rendered by the steam-tugs was salvage service, but they contested the legal right of the libellants (with whom is included the intervenor) to be awarded the *quantum* of compensation demanded.

The steam-boat *Wheeless*, partly laden with cotton bales on deck, while lying at a wharf in the city of Savannah, caught fire, and about 15 minutes afterwards left her moorings, and, the wind being south-westerly, drifted in a north-easterly direction, and ultimately came in contact with the schooner *B. C. Terry*, lying at anchor midway the river, with her head up stream, striking her on the windward or port bow, abreast the fore-rigging. The vessels became entangled, and floated with the stream and ebb tide, until brought up near the left bank by the *Terry's* anchor, which, on the approach of the burning steam-boat, was hove up; but when they collided the chain was paid out, and the anchor again took the bottom, and, I apprehend, dragged awhile. Presently the steam tug-boat *Bramell* came to the windward, and ahead of the *Wheeless*,—she and the schooner being then on fire,—and towed her away from along-side the *Terry*. Just at the time the *Wheeless* was being towed off, the flames from her and from three bales of cotton, which had fallen from her deck upon that of the *Terry*, were sweeping the schooner, and had set on fire her sails, rigging, spars, waist, and parts of her upper works, which burned rapidly, and continued to burn until subdued and extinguished by the tug *M. T. White*, aided by the *Bramell* and *Forest City*.

The libellants assert a derelict salvage; that during the entire time of the service of the steam-tugs, respectively, the *Terry* was abandoned by her crew, without any intention on their part of returning to her, or any hope of saving or recovering her by their own exertions. If so abandoned, she was derelict, although she was afterwards saved by the crew that left her, they having unexpectedly received assistance. 2 Parsons, Shipp. & Adm.

In this case the master and mate and two or three of the crew twice returned on board the schooner before the fire—at least in one instance—was extinguished, but there is no pretence that they saved or assisted to save the vessel.

1. As to the abandonment I shall give the substance of the testimony on this question. The depositions are lengthy, and many portions relate a variety of matter not pertinent to the issues for decision

in this cause. It appears from the evidence that the steam-boat Wheelless, about 15 minutes after the flames were seen from the schooner B. C. Terry, floated from the wharf in the direction of the schooner, then lying at anchor near the middle of the river, with her bow up stream, and struck her on the port bow abreast the fore-rigging; that as the Wheelless approached her she lowered a boat and got it ready; that about the time the Wheelless came along-side of the Terry she was burning very fiercely, and set the Terry on fire, but the fire on the steam-boat abated as the burning cotton bales dropped from her, two or three falling upon the deck of the schooner; that the flames from the Wheelless, then lying along-side, were flying across her, so that the officers and crew could remain no longer on board; that then the master, mates, Kates, and the rest of the crew left in the already-prepared small boat, and subsequently took a position to windward of the fire. Shortly after the steam tug-boat Bramell had hauled away the Wheelless, the master, a mate, and one or two of the crew returned to the Terry—no steam-tug being then present—for the purpose, not of resuming possession of or dominion over the schooner, but, on the contrary, as the master and first mate state in their testimony, they went on board to bring away their own clothes and other property. The fire, however, was then so hot that they were forced to leave the vessel "without getting all their things;" and when they next boarded her the steam tug-boat M. T. White was lying on her windward or port side, and throwing a stream of water on her from a steam fire-pump hose. Nor, on this visit, did the master or any of the crew resume possession of the vessel or cargo, or indicate any intention to do so, or assume any authority whatever? *The Bee*, 1 Ware, 332.

Such are the most material facts on this immediate question, as they appear in the evidence, principally as they were stated by the master and mate of the Terry, and the witness Kates; and they being undisputed, and upon these facts, I am of opinion that this is a case of derelict, in the sense of the maritime law. For a careful perusal of the entire evidence, more especially on this particular subject, has satisfied my mind that when the officers and crew of the schooner left her, after the burning steamboat had come along-side and set her on fire, they abandoned and deserted her, *sine animo revertendi, sine spe recuperandi*. *The Lama*, 14 Wall. 336. If, however, this is not, in the exact and technical meaning of the term, a case of derelict, nevertheless it may well be considered a case of *quasi derelict*, equally



meritorious, and it may not be foreign to remark here that a vessel may be quite derelict on navigable streams and tide-waters, as well as on sea-coasts or on the ocean.

2. As to the salvage service of the *Bramell*, *White*, and *Forest City*, respectively. Some 20 minutes subsequent to the collision, and while the *Wheeless* and *Terry* were still in flames, the *Bramell* came from the windward and took a position 40 yards ahead of them, and sent a boat to the *Wheeless* and attached a line to her. This done, she towed her from along-side the *Terry*, and down the river to the flats, a distance of nearly half a mile, keeping herself as well to windward as possible. Not long after leaving her on the flats the *Bramell* returned to the *Terry*, and at once began to throw a stream of water on her. There is diversity in the evidence as to the time she returned to the *Terry*, and as to the then state of the fire. *Hudson*, master of the *White*, testifies that "about half an hour from the time she towed off the *Wheeless* she came back and commenced playing a stream of water on her; the fire was pretty well under control when she came." *Darby*, senior master on the *White*, says that "she came back in half an hour or an hour after we had been working, and had got the fire smothered; I considered it out." *Hyer*, master of the *Terry*, says: "The *White*, I think, played half an hour on the *Terry*; the fire was almost extinguished when the *Bramell* came up." His mate says that when the second tug (*Bramell*) came up "the fire was nearly extinguished." His steward says "the best of the fire was then out," and *Kates* "thinks the *White* had been there about 20 minutes when the *Bramell* came up, and the fire was then pretty well out." When the *White* saw the *Wheeless* on fire at the wharf she hitched on to the tug-boat *Lightning*, owned also by the American Dredging Company, and towed her to the oil company's dock. There, casting her loose, the *White* steamed to within 15 feet, on the weather side, of the *Terry*, which was then burning very rapidly, and played a two inch and three-quarter stream of water from a steam fire-pump hose on her waist. And *Hudson* testifies that the fire was then so hot that it scorched the paint on the *White*, and that the fire-pumps used could throw a good body of water 30 feet. Quenching this fire, she came along-side and hooked on to a chain plate, and continued throwing the stream of water against the fire on her deck, midship-house hatches,—one being nearly burned through,—spars, and rigging, until the fire was subdued and extin-

guished. In these services the Bramell and Forest City rendered some assistance to the White.

Immediately after the steam-boat and schooner collided they drifted with the stream and tide towards the left bank of the river, until the Terry's anchor brought them up nearly along-side the steam-tugs Forest City, Commodore Foote, and Constitution, then lying at a wharf hard aground, and none with steam up; and, they being to leeward, the flames from the entangled vessels, or from one of them, set the Forest City and another tug on fire. The evidence as to the aid given by the Forest City to overcome the fire on the Terry discloses that it was not until it was under control and almost extinguished by the White, that the Forest City,—then within 10 feet of the Terry's starboard bow,—as she endeavored to subdue the fire on herself and the other boats, would throw a little water occasionally on the jib-boom of the Terry from her hand-pump, which a witness says cast a larger stream than the steam fire-pump of the White. "And when the fire on the schooner Terry was nearly extinguished, and when she had conquered the fire on herself, and on the Foote and Constitution, she threw more water on her than at first," and that the fire on the two tugs was vanquished before the Bramell returned to the schooner. Kates says:

"I saw the Forest City playing upon the tugs that were moored at the wharf; I think this was the principal thing she was doing; I only saw her throw an occasional spurt on the jib-boom of the Terry, and I was looking; I do not know how long she was playing before I saw her; I think not above five or ten minutes."

Hudson says that—

"The fire on the Forest City was put out by their own crew before I went to the Terry, and then they directed their efforts to put out the fire on the Commodore Foote and the Constitution."

Thus I have presented an outline of the controversy, and such testimony as is material to a clear understanding of the case.

Salvage offers a premium, by way of honorary requital, for intrepidity and timely assistance to save property as well as life, and is not a question of mere remuneration *pro opera et labore*.

The prompt movement of the Bramell in steaming to the burning vessels and towing off the Wheeless is well worthy of commendation; for it is manifest that this effectual action was the pioneer that ena-

bled the White to overcome and—aided by the Bramell and Forest City—ultimately to extinguish the fire on the Terry, and rescue her and her cargo, the greater part being crude sulphur in bulk, from imminent destruction. But on viewing all the surrounding circumstances—the position of the Bramell and White, always keeping the weather-gage; the moderate state of the wind, in broad day; on a navigable river, within the ebb and flow of the tide; possessing the propulsive agency of steam, and under easy and ready control—it cannot be claimed that the services of the Bramell and White were attended with hazard to either of them, or peril to their crews. It was, however, urged that the White was in immediate danger because the fire from the Terry scorched the paint on her side. Let this be so; yet it must not be forgotten that the scorching was due to temerity, in coming within 15 feet of the burning schooner, when their steam fire-pump, as Hudson testified, could throw a good body of water 30 feet; and it may also be noted that the witnesses, on the question of danger, expressed the opinion that neither the Bramell nor White was in any peril.

At the time the Forest City and the other tug-boats caught fire from one or both of the burning vessels she was under the lee of the schooner Terry, 10 feet from her starboard bow, fast aground, and without steam. She threw water from her hand-pump against the fire on these boats and herself until it was conquered, and at intervals, while thus employed, threw a little water on the jib-boom of the Terry; and after she had suppressed the fire on herself and the two tugs, she threw more water on her than previously.

It was argued for the respondents that the main purpose of the Bramell and Forest City was to save the tugs moored at the wharf, and that if the Wheeless had not been towed away by the Bramell and the fire extinguished on the Terry the tugs would have been destroyed by fire; and that the saving of the Terry was incidental and subordinate to the main purpose, and that this view is supported by the witness Darby, who proves that the master of the Forest City called on him to pull the Commodore Foote (Lynn?) out, and he refused, because he thought the best way to save the tugs was to put out the fire on the Terry; and that the court should consider these matters in estimating the *quantum* of salvage. It seems to me that the evidence of Darby fails to prove that the saving of the Terry and her cargo was incidental and subordinate to the asserted main purpose. But suppose such purpose did prompt

the Bramell and Forest City to aid in saving the Terry fire; still I cannot perceive how that could affect the respondents injuriously, or why it should be a cause for diminishing the salvage compensation; and even if that purpose were conclusively proven, it could not legally be considered in awarding salvage remuneration. The court, in the case presented here, will look only at the services rendered to the Terry and cargo, and to the towing away of the Wheelless by the Bramell. If they performed salvage service for these tug-boats they have their remedy over, provided they possessed a valid, legal, and subsisting claim. In the case of *Le Tigre*, 4 Wash. 567, Mr. Justice Washington said:

"The owner whose property has been preserved from destruction by acts of a stranger, has no right to inquire into the motives which influenced his conduct, provided he acted legally."

The libellants and intervenor claim half, or at least a third, of the value of the salved property as a reward for their services. In England, the ancient rule allotting a moiety in derelict cases obtained up to the latter part of the reign of Charles II; then the admiralty courts changed the proportion, and so far relaxed the rule as to give a third in cases involving no great danger; and in those attended with extraordinary peril a moiety was still awarded. In the early part of the last century the correctness of a rule of fixed proportions began to be questioned, then discountenanced, and at length abandoned, and a flexible and more salutary rule was declared by the British admiralty tribunals; and, subsequently, (after much diversity of opinion in the federal courts,) the modern English rule was approved and adopted in this country by the supreme court of the United States in the case of *Post v. Jones*, 19 How. 150.

In the case of *The Thetis*, 3 Hagg. 14, the court said:

"All claims of specific proportions, and particularly the distinction of derelict, have been discountenanced, and may be said, indeed, never to have existed in modern times. \* \* \* In cases of extreme hazard, one-third of the value, or one-fourth, or one-sixth, or one-ninth, or a sum of money only on account of salvage is given."

In *Post v. Jones*, *supra*, the court, by Mr. Justice Grier, said:

"The case before us is properly one of derelict. In such cases it has been frequently asserted, as a general rule, that the compensation should not be more than half, nor less than a third, of the property saved. But we agree

with Dr. Lushington (*The Florence*, 20 E. L. & C. R. 622) that the reward in derelict cases should be governed by the same principles as other salvage cases, namely, danger to property, value, risk of life, skill, labor, and the duration of the service;" and that "no valid reason can be assigned for fixing a reward for salvaging derelict property at a moiety, or any given proportion, and the true principle is adequate reward, according to the circumstances of the case."

3. As to compensation or rate of reward: "*Danger to property:*" The court has already ruled that neither the Bramell nor White was in danger. The Forest City was in some danger; not incurred, however, by reason of her salvage service to the Terry, but by being previously set on fire by one or both of the burning vessels. "*Value:*" The schooner and cargo were valued at \$9,794. No evidence was given or agreement made as to the value of the Bramell, Forest City, or White. "*Risk of life:*" Although risk or danger to life is not a necessary element in salvage service, yet "what enhances the pretensions of salvors most," said Sir William Scott in the case of *The Blackford*, 3 Rob. 355, "is the actual danger which they have incurred. The value of human life is that which is, and ought to be, principally considered in the preservation of other men's property; and, if it be shown to have been hazarded, it is most highly estimated." The reason has been already assigned why the salvage enterprise of the Bramell and White was not accompanied with difficulty, personal exposure, or danger to life or limb. "*Skill:*" The alacrity, address, and knowledge of the employment displayed by the Bramell and White deserve approbation. "*Labor:*" It was done in the day-time, the weather mild, the wind light, and, from the facts and surrounding circumstances, it may be fairly inferred that the physical exertion was neither irksome nor fatiguing. "*Duration of the service:*" This is not a prominent ingredient in salvage ventures, and much stress ought not to be laid upon it, for the actual time consumed in the service—here it did not extend beyond an hour—is not, except in peculiar and extraordinary instances, a leading element in decreeing salvage compensation; indeed, the rate of salvage is not governed by the mere extent of labor. Further observations on or allusions to the main questions in this cause are unnecessary. Suffice it to remark that the services rendered by the Bramell and White were of superior merit, and equal in the result achieved; equal be their reward.

During the final hearing, counsel for respondents took the ground that there was no proof of ownership by the libellants, H. J. Dickerson and others. It was ruled in 4 Wash. 651, that if the facts alleged in the libel are not denied in the answer, they are not, therefore, to be taken as confessed. But the twenty-seventh admiralty rule provides that the answer shall be full, explicit, and distinct to each separate article or allegation in the libel. I am of opinion that the question of ownership should have been made *in limine*, by a negative plea, in the nature of a plea in abatement, in analogy to pleading in chancery; or by plea of no title or no property; or by denial in the answer. But if this view is found to be erroneous, the court can correct it by causing the money awarded to these libellants to be placed in the registry until the ownership is settled.

DECREE.

It is ordered, adjudged, and decreed by the court that the defendants pay to the libellants, H. J. Dickerson and others, the sum of \$700 for the salvage services performed by the steam tug-boat Bramell; and also pay to said libellants the sum of \$200 for the salvage services of the steam tug-boat Forest City; and pay to the intervenor, the American Dredging Company, the sum of \$700 for the salvage services of the steam tug-boat Mary T. White, and costs. The clerk, as assessor, will apportion each sum decreed upon the several interests at risk.

END OF CASES IN VOL. 9